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Supreme Court, U.S.
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In The
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

Katherine M., By Next Friend Lesa T.,
Petitioner,

v.

Flour Bluff Independent School District,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

SAM A. WESTERGREN
Counsel of Record
CHRISTOPHER JONAS
615 LEOPARD STREET, SUITE 635
CORPUS CHRISTI, TEXAS 78476
(512) 887-6688

Attorneys for Petitioner

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105 pp

QUESTION PRESENTED

Whether the Court of Appeals disregarded the individualized, unique needs of Katherine M. (Katie), contrary to 20 U.S.C. § 1401(20) of the **Individuals With Disabilities Education Act (IDEA)** and contrary to this Court's decision in ***Board of Education of the Hendrick Hudson Central School District Bd. of Ed., Westchester County v. Rowley,*** 458 U.S. 176, 102 S.Ct. 3034 (1982), which decision, if not reversed, will foster *ad hoc* judicial encroachment upon educational decisions, where:

1. The Court below erred in deciding that the placement of Petitioner in a regional day school program, instead of her neighborhood school, was authorized by 20 U.S.C. § 1414(d)(3), because that Court failed to consider the ***proviso*** to said section, an analysis of which, demonstrates that Petitioner's individualized, unique educational needs take priority over administrative convenience;

2. The only case law upon which the opinion is based is ***Daniel R.R. v. State Bd. of Educ.***, 874 F.2d 1036 (5th Cir. 1989), wherein the Fifth Circuit stated that this Court's interpretation of 20 U.S.C. § 1401(20) in ***Rowley*** was "as imprecise a directive as the language actually found in the Act." 874 F.2d 1036, 1044; and

3. The Court below erred in not finding that Respondent failed to consider that Katie could benefit from a placement at her neighborhood school with the use of supplementary aids and services.

PARTIES TO THE PROCEEDING

A list of all parties to the proceeding is not required, since the names of all parties appear in the caption of the case.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Katherine M. BNF Lesa T., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Fifth Circuit's panel decision (Reavley, J., with Garwood, J., and DeMoss, J.), which is published at 91 F.3d 689, is reproduced in the appendix (App.) at 1a. The order of the Fifth Circuit denying petitioner's motion for

rehearing, which is unpublished, is reproduced at App. 16a. The opinion of the United States District Court for the Southern District of Texas, Corpus Christi Division (Jack, J.), is reproduced at App. 17a. The opinion of the special education hearing officer (Olivia B. Ruiz), is reproduced at App. 35a.

JURISDICTION

The District Court has jurisdiction under 20 U.S.C. § 1415(e). The judgment of the Court of Appeals was entered on July 30, 1996. The order denying the petitioner's motion for rehearing was entered on August 27, 1996. This Court has jurisdiction to issue the writ under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This is a case, as was ***Board of Education v. Rowley***, 458 U.S 176, 102 S.Ct. 3034 (1982), of statutory interpretation. The main issue is whether or not petitioner's rights as a disabled child under the **Individuals With Disabilities Education Act** (hereafter **IDEA**) were properly construed. 20 U.S.C. § 1401(20), reads as follows:

20 U.S.C. § 1401

(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the ***unique needs of children with disabilities***, the teacher, the parents or guardian

of such child, and, whenever appropriate, such child, which statement shall include—

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency reponsibilities[1] or linkages (or both) before the student leaves the school setting,... [emphasized by Petitioner]

An additional provision, which the Court of Appeals construes, is 20 U.S.C. § 1414(d), which is set forth in relevant part as follows.

20 U.S.C. § 1414

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency—

---

[1] So in original. Probably should be "responsibilities".

(3) has one or more children with disabilities who can best be served by a regional or State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate ***except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.*** [emphasized by Petitioner.]

STATEMENT OF THE CASE

The District Court's Findings of Fact, Conclusions of Law and Final Judgment (App. 19a-34a) contains extensive detailed factual findings. The Court of Appeals deferred to the District Court's underlying factual findings under the clearly erroneous standard. (App. 9a). The Court of Appeals did not declare any of the District Court's factual findings to be clearly erroneous; rather, the Court of Appeals disagreed with the District Court's conclusions of law (App. 14a, 15a). Accordingly, the underlying factual findings of the District Court can be relied upon by this Court.

Petitioner was nine years old at the time of the District Court's decision of August 10, 1995. (App. 19a). Katie is eligible for special education and special services because of a severe hearing impairment, deafness. (App. 19a). She lives in the Flour Bluff Independent School District. (App. 21a).

Respondent sent Katie to a regional day school program for hearing impaired students. (App. 26a). The regional day school program utilizes an elementary school, Calk Elementary, which Katie has attended from the age of eighteen months because of the support services for her disability. (App. 21a).

In spite of her disability, Katie's educational abilities progressed and excelled to the extent that she requested she be allowed to attend her neighborhood school in the Flour Bluff Independent School District. (App. 23a, 24a). The request was made in December 1994, and was refused, thereby leading to this controversy. (App. 24a, 25a).

At the time the request was made to transfer to Flour Bluff, Katie was not receiving any direct instruction from the regional day school program. (App. 25a). In addition, Katie's regular education teacher testified that Katie could be successful in any classroom if provided an interpreter, preferential seating, and a copy of class notes. (App. 25a). "Preferential seating" and "note-taking assistance" are modifications often used for special education students in a regular education classroom. (App. 25a). Katie's mother, Lesa T., is a sign language interpreter, and her stepfather is deaf. (App. 22a). Katie has multi-communication skills (signing, lip-reading and above-average verbal skills), is very personable and has remained an honor roll student up to this day. Katie wanted to transfer to Flour Bluff elementary since she is capable of functioning in a world that does not make accommodations for her disability (App. 22a, 27a), and she could attend school with her neighborhood friends. The best way for Katie to function in that world would be to attend the school she would attend were

she not disabled. Because of Katie's exceptional skills, this placement would be appropriate for her.

The Admission, Review and Dismissal committee (ARD) denied Katie's request to transfer to neighborhood school in the Flour Bluff Independent School District. (App. 26a). **The ARD committee did not consider Katie's individual needs when they denied her transfer to her neighborhood school.** (App. 26a, 27a). The Respondent's only consideration, in denying Katie's request, was that Katie was a deaf student, and Flour Bluff ISD sends its deaf students to the regional day school program. (App. 26a).

Proceedings Below

Petitioner's request that she be allowed to attend her neighborhood school in Respondent's school district was denied by the "Individualized Education Program", IEP committee in December 1994. An IEP committee is also called the Admission, Review and Dismissal Committee (ARD).

Petitioner requested a due process hearing under 20 U.S.C. §1415(b)(2) to review the decision of the ARD committee. The decision of the Education Hearing Officer, which decided that Katie could attend her neighborhood school, is contained in the Appendix, 30a-60a.

The Respondent school district appealed the Education Hearing Officer's decision to the United States District Court for the Southern District of Texas, Corpus Christi Division. The District Court held that the Hearing Officer's decision was correct, giving due deference thereto, and made additional

findings, ordering that Katie be placed in her neighborhood school.

The Court of Appeals, in effect, reversed and remanded the decision of the District Court. The panel opinion is contained in the Appendix. (App. 1a).

REASONS FOR GRANTING THE PETITION

The opinion at issue illustrates the lack of interpretive standards in the Fifth Circuit concerning the rights of disabled students who are covered under the Individuals with Disabilities Act (IDEA), 20 U.S.C. §§ 1400 through 1485. As this Court has pointed out in ***Hendrick Hudson District Board of Education v. Rowley***, 458 U.S. 176, 102 S.Ct. 3034 (1982), Congress started addressing the problem of educating disabled children in 1966 when it amended the Elementary and Secondary Education Act of 1965 to establish a grant program "for the purpose of assisting the States in the initiation, expansion, and improvement of programs and projects...for the education of handicapped children...". 102 S.Ct. 3034, 3037. More legislation has ensued, resulting finally in the **Individuals With Disabilities Education Act (IDEA)**, 20 U.S.C. §§ 1400 through 1485, with which this Petition is concerned.

It is of paramount, public importance that the **IDEA** be properly construed so that the mammoth efforts of Congress to give disabled students equal access to a Free Appropriate Public Education, that addresses their unique needs, can be effectuated, and not frustrated by judicial intervention. This Court made an impressive start in ***Rowley*** to ensure that the purpose of the Act is carried out.

The purpose of the Act, as set forth in § 1400(c), is as follows:

> 20 U.S.C. § 1400
>
> (c) *Purpose*
>
> It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in § 1412(2)(B) of this title, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

However, the progress made by this Court should not be limited by opinions such as the one at issue when it is obvious that the purposes of the Act are misunderstood. Indeed, the opinion below did not even allude to this Court's opinion in ***Rowley*** which emphasized the necessity of addressing the unique, individualized needs of the student. The only case mentioned by the Fifth Circuit panel in the body of its opinion is ***Daniel R.R. v. State Bd. of Educ.***, 874 F.2d 1036 (5th Cir. 1989). ***Daniel R.R.*** illustrates the stalemate in the Fifth Circuit's reasoning wherein Justice Gee, joined by Justices Thornberry and Politz, in reference to their inability to grasp the importance of the clear purpose of the Act, and this Court's elucidation of same in ***Rowley***, stated the following:

> "..In ***Rowley***, the Supreme Court fleshed out the Act's skeletal definition of its principal term: "a 'free appropriate public education' consists of educational

> instruction specially designed to meet the unique needs of the handicapped child, supported by services as are necessary to permit the child 'to benefit' from the instruction." ***Rowley***, 458 U.S. at 188-89, 102 S.Ct. at 3042, 73 L.Ed.2d at 701. The Court's interpretation of the Act's language does not, however, add substance to the Act's vague terms' instruction specially designed to meet each student's unique needs is as imprecise a directive as the language actually found in the Act...". 874 F.2d 1036, 1044.

The panel in ***Daniel R.R.*** acknowledged that the Fifth Circuit was in conflict with another circuit concerning its interpretation of the IDEA. The policy of the Fifth Circuit, in such a case, requires the circulation of the conflicting opinion to the entire Court for rehearing *en banc;* however, the Court declined to take any action. 874 F.2d 1036, 1038. It is submitted that the Fifth Circuit, unlike this Court and Congress, does not consider the IDEA of much importance.

The opinion in the Court below criticizes the District Court for focusing upon the costs of the individual program Katie desired at her neighborhood school in the Flour Bluff ISD. (App. 11a). The basis of the Court's statement that Katie's individualized, unique needs were of secondary importance seems to be 20 U.S.C. § 1414(d) which authorizes school districts to utilize regional day schools such as the one in this case. However, the Court below must not have considered the proviso in this section which reads as follows:

> "...The State educational agency may provide such education and services in such manner, and at such

> locations (including regional or State centers), as it considers appropriate, ***except that the manner in which such education are services are provided shall be consistent with the requirements of this subchapter***..." [emphasized by Petitioner].

This proviso was certainly ignored by the Court below. This proviso perhaps brings more sharply into focus the issue before this Court, namely: Are general convenience considerations of administrators to be given priority over the disabled child with his/her unique, individualized needs? The Petitioner does not challenge the importance of regional day school programs as implied by the Court below (App. 11a), she merely claims (and is supported by assessment data, and also, her teacher) that she does not need these specialized instructional services. It is obvious that the reasoning of the Fifth Circuit cannot be reconciled with this Court's holding in ***Rowley***:

> "...When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we **hold** that it satisfies this requirement by providing **personalized instruction** with sufficient support services to permit the child to benefit educationally from that instruction. 102 S.Ct. 3034, 3049. [emphasized by Petitioner].

Thus, if the language quoted above from the Fifth Circuit in ***Daniel R.R.*** is compared with the above holding of this Court, it is clear that the Supreme Court's jurisdiction is properly invoked under 28 U.S.C. § 1254(1).

As can be seen from the legislative history of the IDEA, reproduced in the appendix (App. 68a), Congress considered it

of paramount importance to guarantee disabled children equal access to a "free, appropriate public education" 20 U.S.C. § 1401(18). Congress must look to this Court to properly construe its mandate when the lower courts either refuse to enforce this mandate or misconstrue same.

Rowley is not an isolated instance emphasizing Congress' policy to enhance the individualized, unique needs of disabled students. In ***Burlington School Committee v. Dept. of Educ.***, 471 U.S. 359, 105 S.Ct. 1996 (1985), this Court reiterates the primary importance of the individualized needs of the disabled child when the following is stated:

> "...The ***modus operandi*** of the Act is the already mentioned "individualized education program." The IEP is in brief a comprehensive statement of the educational needs of a handicapped child and the specially designed instructor and related services to be employed to meet these needs. § 1401(19). 105 S.Ct. 1996, 2002.

§ 1401(19) referred to by this Court in the above quoted language in ***Burlington*** is reproduced in the appendix (App. 25a).

In spite of clear pronouncements by this Court of the construction to be given to the Act, the opinion below strongly illustrates the Fifth Circuit Court's improper interpretation of the Act. This results in many children, like Petitioner, not having their individual needs met in accordance with Congress' mandate.

The rationale inherent in this Court's decisions to grant certiorari review found in ***United Gas Pipe Line v. Memphis L., G. & W. Div.*** , 358 U.S. 152. 79 S.Ct. 194 (1959) and

United Steelworkers of American v. N.L.R.B., 376 U.S. 492, 84 S.Ct. 899 (1964) are certainly good precedents for this Court to grant Katie's Petition for Writ of Certiorari. The quality of the education of disabled children is certainly of greater national importance than the validity of rate schedules issued by the Federal Power Commission or the effect of a strike upon national labor policy. In both of these cases, this Court granted certiorari due to a conflict in a decision of this Court and the Courts of Appeal for the District of Columbia Circuit [***United Gas Pipe Line***] and the Court of Appeals for the Second Circuit [***United Steelworkers***].

As a further basis for the granting of this petition, Petitioner shows that the opinion below demonstrates a clear conflict between the Fifth Circuit and the Ninth Circuit concerning the emphasis placed by the respective courts on the individualized needs of the disabled student. As Petitioner has stated, the opinion below states a preference for administrative convenience over the unique needs of the student. This is not so in the Ninth Circuit. In ***W.G., et al., v. Board of Trustees of Target Range School District No. 23, Missoula, Montana***, 960 F.2d 1479 (9th Cir. 1992), the Court states in relevant part the following:

> "The Act requires states and local education agencies to guarantee procedural safeguards for handicapped children and their parents in the provision of a FAPE. 20 U.S.C. § 1415(a). ***Central among the safeguards is the process of developing an "individualized education program" ("IEP") for each child. 20 U.S.C. §§ 1401(a)(18)(D), 1412(1); Rowley, 458 U.S. at 181, 102 S.Ct. at 3038; see also Roland M., 910 F.2d at 987.***

Petitioner recognizes that this Court in ***Rowley*** states that the Act does not guarantee any particular level of education. 102 S.Ct. 3034, 3043. Katie simply asks to function in a world without accommodations for her disability (those found in the regional day school program), when she doesn't need them. Katie's regular education teacher testified that Katie could be successful in any classroom if she were given an interpreter, preferential seating and a copy of class notes (App. 25a). The District Court was correct in finding that placement of Katie in her neighborhood school would most closely approximate the world Katie will encounter as an adult (App. 27a). Katie's request certainly comes within the scope of the Act. Specifically, it fits squarely within § 1401(19), discussed by this Court in ***Burlington***, which "promotes movement from school to post-school activities."

In this case, the District Court upheld the Education Hearing Officer's decision. In ***Rowley***, this Court noted that the District Court overruled the state administrative proceeding. 102 S.Ct. 3034, 3051. Concerning the standard of judicial review under §1415(e)(2), this Court states the following:

> "...the fact that §1415(e) requires that the reviewing court 'receive the records of the [state] administrative proceedings' carries with it the implied requirement that ***due weight shall be given to these proceedings...***". 102 S.Ct. 3034, 3051 [emphasized by Petitioner].

The Court of Appeals did not give any weight to the state administrative proceeding in this case. The District Court was correct in giving due weight to the careful analysis of the Education Hearing Officer. Thus, the opinion of the Court below has, contrary to this Court's statement in ***Rowley*** "substituted their own notions of sound educational policy for those of the school authorities which they review." ***Rowley*** at

p. 3051 of 102 S.Ct. 3034. The opinion at issue failed to give any weight to the decision of the school authority, the Special Education Hearing Officer of the State of Texas.

In summary, because of its lack of rationale, and legal basis, the opinion below cries out for review by this Court. Indeed, the Fifth Circuit, by stating in ***Daniel R.R.*** that this Court has rendered an "imprecise ... directive" concerning a pivotal section in this case, 20 U.S.C. § 1401(20), upon which the opinion at issue relies, it should be concluded that the Fifth Circuit petitions this Court for review in this case. It is clear that further guidance is needed from this Court because of the incorrect interpretation of the Act by the Court below. A correct construction of the Act is required by this Court so that the intent of Congress' mandate can be fulfilled. This is a matter of national importance affecting the educational rights of millions of disabled students.

CONCLUSION

For these reasons, Katie's Petition for Writ of Certiorari should be granted.

Respectfully submitted,

SAM A. WESTERGREN
Counsel of Record
CHRISTOPHER JONAS
615 LEOPARD STREET, SUITE 635
CORPUS CHRISTI, TEXAS 78476
(512) 887-6688

Attorneys for Petitioner

November 25, 1996

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40720

FLOUR BLUFF INDEPENDENT SCHOOL DISTRICT,

Plaintiff-Appellant,

versus

KATHERINE M. BY NEXT FRIEND LESA T.,

Defendant-Appellee.

Appeal from the United States District Court for
the Southern District of Texas

Before REAVLEY, GARWOOD and DeMOSS, Circuit Judges.

REAVLEY, Circuit Judge:

The Flour Bluff Independent School District (Flour Bluff) appeals a district court's placement decision of Katherine M. (Katie), a hearing impaired student. The district court determined that Katie's 1994-95 Individual Educational Plan

(IEP) was not based upon her individual needs, and that her IEP violated the least restrictive environment provisions of the Individuals with Disabilities Education Act (IDEA).[2] We reverse the judgment because the district court misconceived the proximity factor in Katie's placement decision.

I. IDEA

The Individuals with Disabilities Education Act requires states to provide disabled children with a "free appropriate public education" in return for acceptance of federal funds.[3] The student's curriculum is uniquely tailored to the individual student through the annual implementation of an "individualized education program" or "IEP."[4] The IEP is produced by a qualified representative of the local education agency, the child's teacher, the child's parents or guardian, other individuals at the discretion of the agency or the parent, and where appropriate, the child.[5] In Texas, this is called the Admission, Review and Dismissal (ARD) committee.[6] In part, Congress defined the IEP as follows:

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2 20 U.S.C. § 1400, et. seq.

3 20 U.S.C. § 1412.

4 20 U.S.C. § 1412(4); 34 C.F.R. §§ 300.340-300.350.

5 34 C.F.R. §300.344.

6 Tex. Educ. Code § 29.301(1) (effective May 30, 1995).

The term 'individualized education program' means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and whenever appropriate, such child, which statement shall include --

> (A) a statement of the present levels of educational performance of such child,
>
> (B) a statement of annual goals, including short-term instructional objectives,
>
> (C) a statement of the specific educational services to provide to such child, and the extent to which such child will be able to participate in regular educational programs,
>
> * * *
>
> (E) the projected date for initiation and anticipated duration of such services, and
>
> (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

In the case where a participating agency, other than the educational agency, fails to provide agreed upon services, the educational agency shall reconvene the IEP

team to identify alternative strategies to meet the transition objectives.[7]

Once a child's educational program is determined, the local school district must then attempt to place the student in the "Least Restrictive Environment" or "LRE."[8] For example, one of the main concerns of Congress is that the state attempt, as best it can, to mainstream the child, that is, educate the disabled child among non-disabled children.[9] Further, the public agency shall ensure that,

> (a) The educational placement of each child with a disability--
>
> (1) Is determined at least annually;
>
> (2) Is based on his or her IEP; and
>
> (3) Is as close as possible to the child's home.
>
> * * *
>
> (c) Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled.
>
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs.[10]

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7 20 U.S.C. § 1401(20).

8 20 U.S.C. § 1412(5); 34 C.F.R. § 300.550-300.556.

9 20 U.S.C. § 1412(5)(B).

10 34 C.F.R. § 300.552.

II. Katie and her IEP

Katie, a deaf student, resides on the northern end of Padre Island in the Flour Bluff Independent School District. Texas has a system of regional day schools for students with disabilities.[11] They are located at sites throughout the state and draw students from the surrounding communities. Katie began to attend the state's regional day school located in the neighboring Corpus Christi Independent School District at the age of 18 months. The regional day school has facilities attached to an elementary, middle and high school in the Corpus Christi Independent School District. The regional day school for elementary students is associated with Calk Elementary. This enables the day school to provide disabled students with a wide variety of services, ranging from completely independent classes to support services for students in mainstreamed classes.

The Admission, Review and Dismissal committee, named by the Flour Bluff district, decided Katie's IEP for the 1994-95 school year in April of 1994. The IEP provided for placement in mainstream classes with an interpreter and additional assistance for speech therapy, audiological management services, and a deaf education teacher. By two months into her third grade year (the 1994-95 school year), Katie was receiving only support services from the day school and attending fully mainstreamed classes at Calk Elementary

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[11] See Tex. Educ. Code § 30.081 et. seq. (effective May 30, 1995). Similar provisions for regional day schools were formerly governed by Tex. Educ. Code § 11.10.

with the assistance of a sign interpreter.[12] In addition to her regular classes at Calk, Katie was seen 90 minutes per week with a day school speech pathologist and 60 minutes per week with the Corpus Christi Independent School District speech pathologist. During her attendance at Calk, she was a straight-A honor roll student.

In December of 1994, Katie's mother requested that Katie be transferred to the school she would otherwise attend in Flour Bluff. Calk Elementary and Flour Bluff are approximately 16 and 9 miles, respectively, from Katie's home. The ARD committee determined that it would not change Katie's placement unless the transfer would bestow a greater benefit upon her. The committee identified four factors for this determination. They include:

> (1) the comprehensiveness of the Regional Day School Program;
>
> (2) unlike Flour Bluff elementary, which has no deaf students, the Regional Day School Program offers Katie the opportunity for relationships with non-hearing as well as hearing peers;
>
> (3) the Regional Day School Program offers Katie the opportunity to use different interpreters; and

---

[12] At the request of Katie's mother, the ARD agreed to no longer require services of a deaf education teacher.

(4) a placement at Flour Bluff Elementary would not provide Katie an educational benefit superior to the benefit she receives from the Regional Day School Program.

Under the regulations governing IDEA, Katie sought review of the ARD decision by a state agency hearing officer.[13] These regulations provide for a due process hearing where the district refuses, among other things, to change the educational placement of a child.[14] The hearing officer determined that Katie's IEP was not based upon her individual needs in that the "ARD failed to consider placing Katie at the school as close as possible to her home." As a part of her analysis, the hearing officer determined that "[c]onsidering the prominent placement in the federal regulations of the close-to-home provisions, ... [that factor] is to be accorded significant weight." The hearing officer granted Katie's request for a transfer to Flour Bluff. Flour Bluff filed a civil action in district court for review of the hearing officer's decision.[15] The district court found that the ARD violated the procedural requirements of IDEA by not considering Katie's individual needs when devising her IEP. Further, the court found that the evidence from the trial "shows that the ARD committee focussed on whether Flour Bluff could offer a program superior to the Regional Day School, rather than addressing Katie's individual needs." The court indicated

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13 20 U.S.C. § 1415(b)(2); 34 C.F.R. § 300.506(a).

14 34 C.F.R. §§ 300.504 and 300.506.

15 20 U.S.C. § 1415; 34 C.F.R. § 300.511.

that Flour Bluff's evidence concerning the cost of the transfer was minimal, only impacting the school supply funds. Finally, the court found that the school district failed to consider placing Katie close to home, as required by IDEA.[16] Therefore, the IEP was not based upon her individual needs. The court ordered that she be transferred to Flour Bluff, and that Flour Bluff hire an interpreter and contract out for Katie's remaining services. Flour Bluff appeals.

III. Discussion

"The district court's decision that an IEP fulfills the requirements of IDEA is a mixed question of fact and law and, as such, we subject this determination to a de novo review."[17] We are mindful, however, of our appropriate role in this regard.

> Congress left the choice of educational policies and methods where it properly belongs--in the hands of state and local school officials. Our task is not to second guess state and local policy decisions; rather, it is the narrow one of determining whether state and local school officials have complied with the Act.[18]

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16 34 C.F.R. § 300.552.

17 Salley v. St. Tammany Paris School Bd., 57 F.3d 458, 462 (5th Cir. 1995); Christopher M. v. Corpus Christi Indep. Sch. Dist., 933 F.2d 1285, 1289 (5th Cir. 1991).

18 Daniel R.R. v. State Bd. of Educ., 874 F.2d 1036, 1048 (5th Cir. 1989).

We defer to the district court's underlying factual findings, unless they are clearly erroneous.[19]

We begin with two important clarifications. First, this case does not raise the question of whether or not Katie should be mainstreamed. The regional day school Katie attended was attached to Calk Elementary and provided for fully mainstreamed classes when appropriate. Therefore, Katie's reliance on Daniel R. R. v. State Bd. of Educ., 874 F.2d 1036, 1039 (5th Cir. 1989), and other cases concerning mainstreaming are not controlling.

Second, the IEP governs the services a child is to be provided and following that determination, the placement of the student is governed by the Lease Restrictive Environment analysis. These are two separate inquiries. In Katie's case the decision was made by the same ARD committee, but that does not necessarily have to be the case. The IEP is developed, reviewed and revised through a meeting or a series of meetings which includes a special education representative of the public agency (other than the teacher), the child's teacher, one or both of a child's parents, and the child if appropriate.[20] The placement decision of a child is "made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options" who also ensure that placement decision is made in conformity with the

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[19] Sallev, 57 F.3d at 463; Christopher M., 933 F.2d at 1289.

[20] 34 C.F.R. § 300.344.

rules governing the LRE.[21] We do not intend to indicate that a school must have two separate committees to determine the IEP and placement of a student, only that a district could do so. Our focus today concerns the separateness of the IEP and placement decisions, and the fact that the regulations contemplate that those decisions may be made by different groups reflects their separation.

State agencies are afforded much discretion in determining which school a student is to attend. Under the regulations governing the placement of a student in the "Least Restrictive Environment," a child should attend his or her neighborhood school unless the child's IEP requires arrangements that do not exist at that school.[22] In fact, if the child requires such arrangements, the school district has numerous options (public or private) on placing the student.[23]

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21 34 C.F.R. § 300.533(a)(3)-(4).

22 34 C.F.R. § 552(c).

23 In Appendix C of Part 300 of the Regulations entitled "Notice of Interpretation," the commissioner answered the question of whether a "public agency itself [must] provide the services set out in the IEP" as follows:

> The public agency responsible for the education of a child with a disability could provide IEP services to the child
> (1) directly, through the agency's own staff resources, or
> (2) indirectly, by contracting with another public or private agency, or through other arrangements. In providing the services, the agency may use whatever State, local, Federal, and private sources of support are available for those purposes... .

32 C.F.R. Pt. 300, App. C, question 46.

The regulations, not the statute, provide only that the child be educated "as close as possible to the child's home." However, this is merely one of many factors for the district to take into account in determining the student's proper placement.[24] It must be emphasized that the proximity preference or factor is not a presumption that a disabled student attend his or her neighborhood school.[25]

IDEA expressly authorizes school districts to utilize regional day schools such as the one at issue here,[26] and we think the importance of these regional programs is obvious. Undoubtedly there are a limited number of interpreters, speech pathologists with backgrounds in deaf education, and deaf education teachers; and, by allocating these limited resources to regional programs, the state is better able to provide for its disabled children. Additionally, by placing these educators at regional centers, those centers are better able to provide further training for those educators and make substitutions for absent educators.

Of the 400 to 500 students enrolled at Calk Elementary there are approximately 32 students attending the regional day school. In Katie's mainstreamed class there was one other fully

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[24] Barnett v. Fairfax County School Bd., 927 F.2d 146, 153 (4th Cir.), cert. denied, 112 S.Ct. 175 (1991); Murray by and through Murray v. Montrose County School Dist., 51 F.2d 921, 929 (10th Cir.), cert. denied, 116 S.Ct. 278 (1995).

[25] Murray, 51 F.3d at 930; but see Oberti v. Board of Educ., 995 F.2d 1204, 1224 n.30 (3d Cir. 1993).

[26] 20 U.S.C. § 1414(d).

mainstreamed deaf student, and one other part-time mainstreamed student. The regional day school provided the interpreters, speech therapists, and other support services for the deaf students at Calk.[27]

There were approximately 15 sign interpreters in the regional day school assigned to the elementary, middle and high schools associated with the regional program within the Corpus Christi Independent School System. Of those 15, only 10 were certified. The day school had obtained a waiver from the Texas Education Agency for the remaining five. In the year prior to the onset of this litigation, the regional day school had received only five applicants for four openings at the school. There was testimony that this was fairly representative of the supply of interpreters for the day school. In fact, the regional day school could only meet its demand by hiring uncertified interpreters.

Katie's mother, who was the lead interpreter at the regional day school, testified concerning the procedures implemented in staffing interpreters at the regional day school.[28] Because of the short supply of interpreters, substitutions were difficult when interpreters were ill or otherwise unavailable. The regional day school provided a mentoring program and

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[27] There was also evidence that Katie required the use of a hearing device called a "phonic ear." The evidence indicates some maintenance services for this device may have been provided by the regional day school.

[28] In October of 1994, Katie's mother started her own interpreter business. After that date she remained a contract employee with the regional day school on a part-time basis.

staff development programs for their interpreters. The interpreters' proficiency levels were increased through the school's extensive evaluation system. The more proficient interpreters were allocated to the advanced grades because of the increased complexity of the subjects.

The evidence showed that the supply of speech pathologists was equally low. At the regional day school at Calk Elementary, both of the two speech pathologists had experience in deaf education, but this was unusual. Often the regional day school was without speech pathologists with that experience. In fact, it was very difficult to hire a speech pathologist even without experience in deaf education. The superintendent of Flour Bluff testified that in September of 1994 the district began advertising for two speech therapists. In April or May of the next year they finally received four applicants, none of whom had more than a bachelor's degree. The district was forced to hire two of those four.

The rationale for creating a regional day school can also be seen by examining Katie's third grade class. If all three students were to attend different schools, each district would be required to hire an additional interpreter from the already low supply. The scarcity of resources would be worsened if each child in the various grades attending the regional school were to return to this or her home district. We believe that the decision to create the regional day schools is a sound policy decision that was intended to be left to the state.

Distance remains a consideration in determining the least restrictive environment. The regulations say that it is. The child may have to travel farther, however, to obtain better services. And in this case, distance is not controlling -- from Katie's home to the Flour Bluff school is approximately 9 miles, from her home to Calk Elementary it is 17 miles.

Flour Bluff School District was free to utilize the regional day school for its disabled students. Educating Katie "close to home" was only a factor for the school district to consider when determining her placement in the Least Restrictive Environment; and with the proximity of the regional day school to Katie's home, that factor was not controlling.

The district court erred in replying upon the hearing officer's conclusion that Flour Bluff did not "think carefully and seriously" about placing Katie in her neighborhood school. The hearing officer's conclusion was based upon her interpretation of the regulations that the "close to home" provision should be "accorded significant weight." While it is not clear that the district court similarly interpreted the regulations, the district court did presume incorrectly that her neighborhood school was the proper placement even though Katie required other arrangements which were not then in existence at Flour Bluff. Nor did the district court apparently afford any weight to the testimony of Flour Bluff officials concerning the scarcity of educational resources upon which the district had grounded its policy decision to send disabled students who required certain

services to the regional day school.[29] Rather, the court focused simply upon the costs of implementing the individual program instead of upon both the financial and resource costs of duplicating the programs. Therefore, because we read the district court's judgment to impose proximity as a presumptive factor in the placement decision and because the district court failed to consider Flour Bluff's policy consideration in sending Katie to the regional day school , we reverse that judgment.

IV. Conclusion

During oral arguments, we learned that Katie had been transferred to Flour Bluff to comply with prior orders in the case. Under IDEA's "stay-put" provisions, Katie should have remained at Calk Elementary during the pendency of this litigation, unless the move was agreed upon by the district and Katie's mother.[30] One of the obvious purposes of the "stay-put" provision is to reduce the chance of a child being bounced from one school to another, only to have the location changed again by an appellate court.

We remand this case to the district court, although the proceedings there may require nothing more than dismissal. The IEP for Katie for the forthcoming year will soon be

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[29] See Barnett, 927 F.2d at 152 ("Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make.")

[30] 20 U.S.C. § 1415(e)(3); 34 C.F.R. § 300.513(a).

completed and, consistent with this opinion, the ARD committee should consider the fact that Katie is currently attending Flour Bluff and that Flour Bluff may now have the support services she requires.

REVERSED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40720

FLOUR BLUFF INDEPENDENT SCHOOL DISTRICT,

Plaintiff-Appellant,

versus

KATHERINE M. BY NEXT FRIEND LESA T.,

Defendant-Appellee.

Appeal from the United States District Court for
the Southern District of Texas

ON PETITION FOR REHEARING
(August 27, 1996)

Before REAVLEY, GARWOOD and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rhearing filed in the above case is denied.

ENTERED FOR THE COURT:

Thomas M. Reavley
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
CORPUS CHRISTI DIVISION

FLOUR BLUFF INDEPENDENT SCHOOL DISTRICT	§	
Plaintiff,	§	
vs.	§	C. A. NO. C-95-178
KATHERINE M. B/N/F LESA T.	§	
Defendants.	§	

FINDINGS OF FACT, CONCULSIONS OF LAW AND FINAL JUDGMENT

On July 26, 1995, the above styled action came on for trial before the Court. After consideration of all evidence presented on behalf of both the Plaintiff and the Defendants, as well as the argument of their counsel, this Court enters the following Findings of Fact, Conclusions of Law and Final Judgment:

I. ADMINISTRATIVE PROCEEDINGS

Defendant Katherine M. (Katie) is a nine year old student ligible for special services due to a hearing disability described as bilateral severe to profound sensorineural hearing

loss. Katie challenged her educational program, alleging her least restrictive environment" would be her home campus in the Flour Bluff Independent School district (Flour Bluff ISD) rather than the Regional Day School Program for the deaf, which she is currently attending at Calk Elementary. This proceeding was filed pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, et seq.

In December, 1994, an Admission, Review and Dismissal Committee (ARD) considered Katie's request to transfer to her home school at Flour Bluff ISD. The ADR denied Katie's request to transfer, which Katie challenged by filing a Request for Due Process Hearing on January 6, 1995. A hearing was held before Hearing Officer Olivia Ruiz on February 9 and 10, 1995. On April 3, 1995, Ms. Ruiz issued a decision granting Katie's request for placement at Flour Bluff ISD. The Hearing Officer found that Flour Bluff ISD violated the IDEA by not basing Katie's placement decision on her individualized needs. The Hearing Officer also found Flour Bluff ISD violated the least restrictive environment provisions of the IDEA by placing Katie at Calk Elementary rather than the school closest to home, and by not providing a continuum of alternative placements. Flour Bluff ISD then filed this suit in federal court for judicial review under 20 U.S.C. § 1415(e)(2). A de novo trial was held in this Court on July 26, 1995.

II. FINDINGS OF FACT

The Court makes the following findings of fact. Any findings of fact containing conclusions of law shall be considered as such.

Katie resides on Padre Island within the geographical boundaries of Flour Bluff Independent School District (Flour Bluff ISD). Flour Bluff ISD provides services to Katie through the Regional Day School Program located outside the Flour Bluff school district at Calk Elementary. The Regional Day School Program at Calk Elementary is operated by the Corpus Christi Independent School District (CCISD). CCISD operates the Regional Day School for students residing in a multi-county area, with students referred from Nueces county and 10 other surrounding counties in South Texas. Each contracting school district pays the Regional Day School $4,850 per student for these services. The Regional Day School Program utilizes Calk Elementary, Hamlin Middle School and Ray High School. Itinerant services, not including the services of an audiologist c deaf education teacher, are available on a limited basis in Flour Bluff ISD by contracting with the Regional Day School.

The Regional Day School offers support services in its classrooms, which range from self-contained classrooms with all deaf children to mainstream classrooms with hearing children. Flour Bluff ISD has sent all of its deaf students to the Regional Day School since inception of the program.

Katie has attended the Regional Day School since she was eighteen months old and recently completed the third grade at Calk Elementary. Of the approximately 500 students enrolled

at Calk Elementary in 1994-95, thirty-one, including Katie, were auditorially handicapped and received services from the Regional Day School Program.

Katie began to be fully mainstreamed at Calk Elementary about two months after the beginning of the 1994-95 school year. Thereafter, Katie's school schedule included, in addition to her regular mainstream academic subjects, 90 minutes per week with the Regional Day School speech pathologist and 60 minutes per week with the CCISD speech pathologist. Additionally, a full time interpreter served Katie in her third grade classroom, along with another mainstreamed deaf child, "Michael". However, for the 1995-96 school year Katie would be the only fully mainstreamed student at Calk Elementary, since Michael applied to return to his home school in Mathis Independent School District and was accepted at his home school.

Outside of school, Katie has many opportunities to interact with deaf individuals. During the summer she attends the recreational program sponsored by the Corpus Christi Council for the Deaf and goes to camp with other deaf children. She attends a deaf drama club and is a member of the Coastal Bend Silent Club. George Falk, a deaf adult, lives with Katie and her mother, Ms. T. Ms. T is a sign interpreter. In the home, communication is by American sign language, signed English and speech. In addition, Ms. T's involvement in the deaf community provides many opportunities for Katie to interact with deaf individuals. With a hearing mother, Katie has access to both deaf and hearing cultures in her home. Outside of the

school setting, Katie also has access to counselors who have experience working with the deaf.

Katie participates in many activities with hearing children her age. She takes drama classes at a local theater where she vocalizes on stage. She participates in school plays and takes singing lessons. She also plays on a neighborhood soccer team with hearing children; she does not use an interpreter during games. She takes swimming lessons, ballet and tennis lessons with hearing children.

Katie is a straight-A student on the A honor roll. She has a history of excelling. In the first grade she was on the A honor roll. Too advanced for first-grade math, Katie was placed in a second-grade mainstream math class. In second grade she was on the A-B honor role. Katie uses total communication, i.e., she signs, lip reads, uses speech, uses auditory equipment, and uses a hearing aid. She currently tests on grade level or above in all areas.

In March 1994, a communication assessment was conducted to test Katie's various areas of communication. The assessment found that in speech and speechreading, Katie's skills were excellent. In oral language, Katie could understand simple and complex English structures but needed to increase the complexity of her oral language. In fingerspelling, her receptive and expressive skills were limited by her ability to spell. In receptive and expressive sign language, Katie demonstrative no specific weaknesses. In receptive and expressive written language, Katie's skills were appropriate to

her age and grade level. The assessment found that Katie could generally communicate very well with signing and non-signing adults and peers. The evaluator's recommendations included total communication, amplification, audiological services, an English-and-reading program emphasizing language skills, speech therapy, an interpreter for all mainstream classes, and auditory training with a teacher experienced with the hearing-impaired.

In April 1994, an ARD Committee developed Katie's Individualized Educational Plan (IEP) for the 1994-95 school year. This IEP provided for placement in a mainstream classroom with an interpreter. The IEP further provided for speech therapy, audiological management services, and a deaf education teacher. In October 1994, an ARD changed Katie's IEP to eliminate services from a deaf education teacher. The ARD noted that "resource class assistance may not be appropriate for Katie at this time."

In December 1994, an ARD considered Ms. T.'s request to transfer Katie to Flour Bluff Elementary. Ms. T's request is not unusual. Out of three non-hearing Flour Bluff ISD students, Katie is the only student who is presently mainstreamed at the Regional Day School. Her request was apparently triggered by her friend and classmate "Michael's" return to his home school, in addition to her desire to go to Flour Bluff ISD with the neighborhood children. Historically, Katie's IEP has been formulated by the Regional Day School with a single representative from Flour Bluff ISD. However, there is no possibility of returning the student to the contracting school

district without the approval of that district. Katie's last IEP, conversely, was formulated by a group formed almost completely with Flour Bluff ISD voting members.

Pat Johnson, a Regional Day School consultant and a voting member of the ARD, admitted that educationally Katie does not receive any direct instruction from the Regional Day School Program. Additionally, during the school year 1991-92 Calk Elementary did not have a speech therapist specifically trained for the deaf. From 1992-94 Calk Elementary utilized a speech therapist from CCISD, then hired a therapist that could not sign, but did have experience working with the deaf. Since 1994 Calk Elementary has contracted with CCISD for a speech therapist, who is on campus two times a week.

Katie's third-grade teacher at Calk Elementary was Margaret McGaffee. Before teaching Katie, Ms. McGaffee had no experience teaching disabled children. Ms. McGaffee does not sign. To become Katie's teacher, Ms. McGaffee did not receive any service training or signing classes. Since Katie entered her class, Ms. McGaffee has not used any of the Regional Day School services or personnel to help teach Katie. Specifically, Ms. McGaffee never used the speech therapist, the deaf education teacher, or the audiologist. At the December 1995 ARD, Ms. McGaffee unequivocally stated that Katie could be successful in any classroom if she were given an interpreter, preferential seating and a copy of class notes. Ms. McGaffee described Katie as an excellent student who gets along well with other children and has no behavioral problems.

The ARD determined that it would not change Katie's placement unless the transfer would bestow a greater benefit upon her. Several ARD members stated that their vote was not based on Katie's abilities, but on the Regional Day School's services. In denying the transfer request, the ARD's school district members stated the following reasons: (1) certified personnel are readily available on the campus of Calk Elementary; (2) Calk provides Katie peer relations with both non-hearing and hearing students; (3) Calk offers the opportunity to work with various interpreters; (4) Flour Bluff has no other students with the same condition as Katie; (5) the services at the Regional Day School are more comprehensive; and (6) Regional Day School personnel are experienced with deaf students.

The Regional Day School Program has no power or authority to render an IEP placing a student in a school outside of Calk Elementary without the agreement of the school district. Flour Bluff ISD did not agree to Katie's placement at Flour Bluff, therefore, it was impossible for Katie's IEP to include her placement at Flour Bluff. Flour Bluff has never allowed a child placed at the Regional Day School Program to return to his or her home school. However, the ARD did promulgate an IEP for Katie's former classmate, Michael, to return to his home school in Mathis, because the Mathis Independent School District agreed to accept Michael and provide Michael with services at his home campus.

The trial evidence showed that the ARD's Flour Bluff ISD members did not discuss the merits or feasibility of

providing IEP-required services at Flour Bluff Elementary. Flour Bluff Elementary represents the least restrictive environment for Katie in that it most closely approximates the world Katie will encounter as an adult. Katie is capable of functioning in a world that does not make accommodations for her disability and she would benefit from the opportunity to begin functioning in that world.

The evidence shows that Katie did not utilize most of the services offered through the Regional Day School Program. During all of last year Katie did not utilize the services of a deaf education teacher, and was mainstreamed in all of her classes. Katie would require an interpreter, appropriate seating, speech therapist and use of an audiologist on an itinerant basis. For the set fee of $4,850, Flour Bluff can contract with the Regional Day School for the use of an audiologist and deaf education teacher on an itinerant basis. This is the per student rate that all school districts pay to the Regional Day School. However, the Regional Deaf Education supervisor testified that this may not be necessary, as in "Michael's" case the Regional Day School developed a free six week plan for Mathis Independent School District, which, if it succeeds, avoids the use of both the deaf education teacher and the audiologist. The same witness testified that Katie is at least academically as advanced as "Michael".

The trial evidence also showed that the added expense in providing Katie services at Flour Bluff would include a full time interpreter, and a speech therapist. The addition of one student in FBISD would require the services of one more

speech therapist as the present personnel are completely subscribed. This increased cost would average between $9,500 to $12,000 per year. The cost of an interpreter is $13,000 to $16,000 per year. A speech therapist is an additional $2,000 per year.[31] Flour Bluff ISD would be eligible for a $7,500 offset from the state to defray these costs. This figure does not include the additional savings of $4,850 for itinerant services that might not be needed. Plaintiff offered no evidence as to how this expenditure would affect the education of other children in the district, other than a possible impact on teacher supplies.

The evidence showed that Flour Bluff ISD did not consider Katie's individualized needs and that Katie's IEP was not the least restrictive educational alternative.

III. CONCLUSIONS OF LAW

The Court makes the following conclusions of law. Any conclusion of law containing findings of fact shall be considered as such.

The IDEA, 20 U.S.C. § 1400, et seq., provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with certain goals and procedures. To qualify for federal financial assistance under the Act, a state

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[31] This figure is based upon a half-time speech therapist trained with the hearing-impaired at a cost of $16,000 per year, to be used by Katie one-eighth of the time (thirty minutes of a four hour day).

must show that it "has in effect a policy that assures all handicapped children the right to a free appropriate education." 20 U.S.C. § 1412(1). The Act requires that "to the maximum extent appropriate" the school district must educate handicapped children "with children who are not handicapped." § 1412(5).

The "free appropriate public education" required by the Act is to be tailored to the unique needs of the handicapped child by means of an individualized educational program" (IEP). § 1401(8). The IDEA defines a "free appropriate public education" as special education and related services that:

(a) have been provided at public expense, under public supervision, and direction, and without charge;
(b) meet the standards of the State educational agency;
(c) include an appropriate preschool, elementary, or secondary school education in the State involved; and
(d) are provided in conformity with the individualized education program required under § 1414(a)(5) of the IDEA.

20 U.S.C. § 1401(a)(18).

The individualized education program, or IEP, is the "modus operandi" of the IDEA. *School Committee of the Town of Burlington Massachusetts v. Department of Educ. of the*

Commonwealth of Massachusetts, 477 U.S. 359, 368-369, 105 S.Ct. 1996, 2002 (1985). The IEP is:

> a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those services. § 1401(19). The IEP is to be developed jointly by a school official qualified in special education, the child's teacher, the parents or guardian, and, where appropriate, the child. In several places, the Act emphasizes the participation of the parents in developing the child's educational program and assessing its effectiveness.

Id..

This Court's inquiry in an action brought under § 1415(e)(2) is twofold:

> First, has the State compiled with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

Board of Educ. of the Hendrick Hudson Central School Dist. v. Rowley, 458 U.S. 176, 202-204, 102 S.Ct. 3034, 3049 (1982). In its inquiry, the Court must make an independent

determination based on a preponderance of the evidence, giving due weight to the state administrative proceeding. Id. at 204-206, 102 S.Ct at 3050. However, "the hearing officer's findings are not conclusive and the district court may take additional evidence and reach an independent conclusion." *Teague Independent School Dist. v. Todd L.*, 999 F.2d 127, 131 (5th Cir. 1993). Additionally, because Katie is challenging the appropriateness of her IEP, she bears the burden of proof. *Christopher v. Corpus Christi Independent School District*, 933 F.2d 1285, 1290-91 (5th Cir. 1991).

(a) Individualized Needs

School officials are required to determine the appropriate placement for each child and must develop an IEP that tailors the child's education to his or her individual needs. *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989). In this case, the Court finds the ADR violated the procedural requirements of the IDEA by not considering Katie's individual needs when devising her IEP. The evidence from the trial in this cause shows that the ADR committee focussed on whether Flour Bluff could offer a program superior to the Regional Day School Program, rather than addressing Katie's individual needs.

In denying Katie's request to transfer, Flour Bluff ISD touched upon the added expense of providing Katie with services at Flour Bluff. Cost is always a valid factor for school districts to consider. *Roweley*, 458 U.S. at 199, 102 S.Ct. at

3047. However, costs must be balanced against other considerations.

> [A] school district may [not] decline to educate a handicapped child in a regular classroom because the cost of doing so, with appropriate supplemental aids and services, would be incrementally more expensive than educating the child student in a self-contained special education classroom . . . If the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate.

Greer v. Rome City School District, 950 F.2d 688 (11th Cir. 1991), remanded on other grounds, 956 F.2d 1025, *aff'd*, 967 F.2d 470 (11th Cir. 1992).

Although the Court specifically inquired as to the impact the costs of Katie's placement at Flour Bluff would have on other students in Flour Bluff, Plaintiff's witnesses offered almost no information regarding possible impacts. Flour Bluff Superintendent Leroy DeHaven stated only that the increased costs may impact school supply funds. Therefore the Court finds costs cannot justify the failure of Katie's IEP to address her individual needs.

(b) Close To Home Provisions

School districts are required to provide disabled students a free appropriate education in the least restrictive environment.

20 U.S.C. § 1415. The IDEA requires that school districts "shall ensure that . . . [t]he educational placement of each child with a disability . . . [i]s as close as possible to the child's home." 34 C.F.R. § 300.552. However, placing a child as close as possible to home is not an absolute obligation. *Schuldt v. Mankato Independent School District*, 937 F.2d 1357 (8th Cir. 1991); *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991).

The Hearing Officer found the school district failed to consider placing Katie close to home, because it did not think carefully and seriously about such placement. This Court agrees It is not an exaggeration to summarize the ARD's reasoning as: (1) Katie is deaf; (2) the Regional Day School Program provides a comprehensive program for deaf students; (3) therefore, Katie should go the Regional Day School Program.

IV. CONCULSION

The Court finds Katie's 1994-95 IEP was not based upon her individual needs, and that her IEP violated the least restrictive environment provisions of the IDEA. The Court renders FINAL JUDGMENT in favor of Defendant Katie M. b/n/f Leesa T. and ORDERS that Katie's request for transfer to Flour Bluff Elementary for the 1995-96 school year is GRANTED.

ENTERED this 9 day of August, 1995.

Janis Graham Jack

United States District Judge

No. 152-SE-195

KATHERINE M., bnf	§	BEFORE A SPECIAL
LESA T.	§	EDUCATION
Petitioner	§	
vs.	§	
	§	HEARING OFFICER
FLOUR BLUFF	§	
INDEPENDENT SCHOOL	§	
DISTRICT	§	
Respondent	§	FOR THE STATE OF TEXAS

DECISION OF THE HEARING OFFICER

Statement of the Case

Petitioner Katherine M. (Katie) contends that Respondent Flour Bluff Independent School District (Flour Bluff ISD) failed to provide her a free appropriate public education in the least restrictive environment. Petitioner seeks placement at her home campus in Flour Bluff. Respondent contends that Petitioner should remain at the Regional Day School Program for the Deaf (RDSP or Program) in Corpus Christi.

Procedural History

On January 6, 1995, Katie filed a request for a due process hearing. The hearing, originally scheduled for February 2-3, was continued because Respondent's attorney

was in trial on those dates. The Parties agreed to reschedule the hearing for February 9-10, conduct a telephone pre-hearing conference February 7, and waive the five-day disclosure deadline.

The hearing was held on February 9 and 10. Katie was represented by Christopher Jon[illegible], an attorney in Corpus Christi. Respondent was represented by Shirley Selz and Deborah Travis with the Corpus Christi firm of Gary, Thomasson, Hall and Marks.

At the conclusion of the evidence, the Hearing Officer asked each side to submit briefs by March 20 and reply briefs by March 23. The Parties agreed that the Hearing Officer would render a decision no later than April 3, 1995.

Findings of Fact

1. Katie is an eight-year-old, third-grade student who resides in Flour Bluff ISD. She attends Calk Elementary, site of the Corpus Christi Regional Day School Program. Although located on Padre Island, the Flour Bluff school district is within the geographic boundaries of Corpus Christi. Katie is eligible for special education services under the classifications of auditory and speech handicapped. (Vol. 1, p. 21; Exhibit P1, R3).

2. While pregnant with Katie, Lesa T. coincidentally began taking classes to become an interpreter for the deaf. At 12 months, Katie was diagnosed as profoundly

deaf. Ms. T. had no reason to suspect that Katie would be born deaf. Neither side of the family had a history of deafness. (Vol. 1, pp. 27-30).

3. Katie entered the Corpus Christi RDSP when she was 18 months old. Students generally enter the Program at age two, but Katie was enrolled early because she understood sign language quickly. (Vol. 1, p. 31).

4. The Corpus Christi RDSP provides hearing-impaired students a comprehensive program to address their needs, which enables them to be mainstreamed in a regular education classroom. The Program employs 16 interpreters, three speech therapists, two diagnosticians experienced with hearing-impaired students, an audiologist, a counselor who signs, and deaf education teachers. The Program distributes these support personnel among four campuses to facilitate cooperation with regular education teachers. If necessary, Program personnel are available daily to work with the teachers and students. Centralizing services on four campuses utilizes personnel efficiently and provides hearing-impaired students a comprehensive and consistent program. (Vol. 1, pp. 204-206, 209, 211-213, 228).

5. From Katie's home, Calk Elementary is six miles farther than Katie's home campus. (Vol. 1, p. 35; Vol. 2, p. 317).

6. Ms. T. is now a certified Level 3 interpreter, which means she may interpret in almost any situation, including

in court. From 1989 to October 1994, Ms. T. worked in the Corpus Christi RDSP. When she resigned in October 1994, she supervised 15 interpreters as the Lead Interpreter. Ms. T. resigned to begin her own interpreter service to the deaf. At the time of the February 1995 hearing, Ms. T. still supervised the interpreters on a contract basis. (Vol. 1, pp. 26-27, 41, 44).

7. Outside of school, Katie has many opportunities to interact with deaf individuals. During the summer, she attends the recreational program sponsored by the Corpus Christi Council for the Deaf and goes to camp with other deaf children. She attends a deaf drama club and is a member of the Coastal Bend Silent Club. George Falk, a deaf adult, lives with Katie and her mother. In the home, communication is by American sign language, signed English, and speech. In addition, Ms. T's involvement in the deaf community provides many opportunities for Katie to interact with deaf individuals. With a hearing mother, Katie has access to both deaf and hearing cultures in her home. (Vol. 1, pp. 38, 65, 69-70, 98, 123).

8. Katie participates in many activities with hearing children her age. She takes drama classes at a local theater where she vocalizes on stage. She also participates in school plays. She takes singing lessons, enjoys singing, and sings in church. She plays on a local soccer team with hearing children; she does not use an interpreter during games. She takes swimming lessons with hearing children. (Vol. 1, pp. 56, 61, 65).

9. Katie is a straight-A student on the A honor roll. She has a history of excelling. In the first grade, she was on the A honor roll. Too advanced for first-grade math, Katie was placed in a second-grade mainstream math class. In second grade, she was on the A-B honor role. Katie uses total communication, i.e., she signs, lip reads, uses speech, uses auditory equipment, and uses a hearing aid. (Vol. 1, pp. 31-32, 34, 123-124, 213).

10. In March 1994, while Katie was in second grade, she was given a comprehensive individual assessment by Marynelle Davis, a diagnostician experienced in sign language. On the intellectual test, which measures intelligence, Katie was on the superior-range level. Ms. Davis noted that due to Katie's hearing loss, the Performance Scale rather than the Verbal Scale should be considered valid.

The Performance Scale, without using language, measures intellectual capacity and abilities. The Verbal Scale, however, requires language use by both the examiner in administering the test and the examinee in performing test tasks. On the Performance Scale for Katie's age group, scores usually range between 9 and 12; Katie's scores ranged between 12 and 16. A Verbal Scale vocabulary subtest revealed linguistic deficits, especially a weakness in Katie's ability to define vocabulary words in depth. This weakness is directly attributable to her hearing loss. Except for this vocabulary subtest, Katie's scores on the Verbal Scale ranged from 9 to 13.

On the Educational Performance Levels test, which measures functioning level in reading, math, and spelling, Katie scored in the eight-years-and-above level, even though at the time of the test she was only seven years, nine months. She was on grade level or above in all areas. In general, Katie's language development was equal to or above her peers. Ms. Davis noted that Katie did not demonstrate any significant academic or developmental deficiency; however, she recommended continued special education services in the form of sign language interpreting. (Vol. 2, pp. 325, 379-380; Exh. P5).

11. Also in March 1994, a communication assessment was conducted to test Katie's various areas of communication. The assessment found that in speech and speechreading, Katie's skills were excellent. In oral language, Katie could understand simple and complex English structures but needed to increase the complexity of her oral language. In fingerspelling, her receptive and expressive skills were limited by her ability to spell. In receptive and expressive sign language, Katie demonstrated no specific weaknesses. In receptive and expressive written language, Katie's skills were appropriate to her age and grade level. The assessment found that Katie could generally communicate very well with signing and non-signing adults and peers. The evaluator's recommendations included total communication, amplification, audiological services, an English-hand-reading program emphasizing language skills, speech therapy, an interpreter for all mainstream classes, and auditory training with a teacher experienced with the hearing-impaired. (Exh. PS).

12. In April 1994, an Admission, Review, and Dismissal Committee (ARD) developed Katie's Individualized Educational Plan (IEP) for the 1994-95 school year. This IEP provided for placement in a mainstream classroom with a regular education teacher and an interpreter. These two individuals were responsible for monitoring Katie's IEP. The IEP further provided for speech therapy, audiological management services, and a deaf education teacher. (Exh. P1).

13. In October 1994, an ARD changed Katie's IEP to eliminate services from a deaf education teacher. The ARD noted that "resource class assistance may not be appropriate for Katie at this time." (Exh. P2).

14. In December 1994, an ARD considered Ms. T.'s request to transfer Katie to Flour Bluff Elementary. In denying the transfer request, the ARD's school district members stated the following reasons: 1) certified personnel are readily available on the campus of Calk Elementary; 2) Calk provides Katie peer relations with both non-hearing and hearing students; 3) Calk offers the opportunity to work with various interpreters; 4) Flour Bluff has no other students with the same condition as Katie; 5) the services at the RDSP are more comprehensive; and 6) RDSP personnel are experienced with deaf students. (Exh. P3).

15. The ARD determined that it would not change Katie's placement unless the transfer would bestow a greater benefit upon her. The ARD did not base its decision on Katie's individualized needs or abilities. Several ARD members stated

that their vote was not based on Katie's academic abilities but on the Program's services. Ultimately, the ARD based its decision on the RDSP's comprehensiveness and the lack of a similar program in Flour Bluff.

Pat Johnson, a RDSP consultant and a voting member of the ARD, admitted that educationally Katie does not receive any direct instruction from the RDSP. Ms. Johnson nonetheless insisted that Katie needed the comprehensiveness of RDSP. (December 15, 1995 ARD Transcript [ARD T.], pp. 2-4, 6, 13-17, 22, 24-25; Vol 1, 229, 232-233, 239).

16. Katie's third-grade teacher at Calk Elementary is Margaret McGaffee. Before Katie, Ms. McGaffee had no experience teaching disabled children. Ms. McGaffee does not sign. To become Katie's teacher, Ms. McGaffee did not receive any in service training or signing classes. Since Katie entered her class, Ms. McGaffee has not used any of the RDSP services or personnel to help teach Katie. Specifically, Ms. McGaffee never used the speech therapist, the deaf education teacher, or the audiologist.

At the December 1995 ARD, Ms. McGaffee unequivocally stated that Katie could be successful in any classroom if she were given an interpreter, preferential seating, and a copy of class notes. Ms. McGaffee described Katie as an excellent student who gets along well with other children and has no behavioral problems. (Vol. 1, pp. 146, 149, 154, 171-72; ARD T. pp. 19-21).

17. In explaining their decision, the ARD's school district members repeatedly emphasized the benefits Katie receives from the RDSP's comprehensiveness. There was no discussion of the merits or feasibility of providing IEP-required services at Flour Bluff Elementary. Nor was there any discussion of alternative placements. Ms. Johnson testified that both schools could offer an appropriate program, but the RDSP is more appropriate because it offers a comprehensive program. (Vol. 2, pp. 267-289).

18. The RDSP offers support services in its classrooms, which range from self-contained classrooms with all deaf children to mainstream classrooms. The RDSP offers such services on four campuses. RDSP services, except for interpreters and speech therapists, are available to Flour Bluff on an itinerant basis. (Vol. 1, pp. 211, 213, 230; Vol. 2, pp. 253-54, 258-258, 269, 275, 283, 292).

19. At the time of the hearing, Flour Bluff contracts with RDSP for a deaf education teacher and an audiologist. A speech therapist is assigned to Flour Bluff Elementary who could fulfill Katie's IEP, even though the therapist has no experience with deaf students. Flour Bluff ISD has sent all of its deaf students to the Corpus Christi RDSP. No Flour Bluff student has ever returned to his or her home campus. (Vol. 2, pp. 328-329).

20. Flour Bluff Elementary represents the least restrictive environment because it most closely approximates the world Katie will encounter as an adult. The Regional Day

School Program is a an environment created to assist deaf students. This type of environment rarely exists in the outside world. Katie is capable of functioning in a world that does not make accommodations for her disability. At this young age, she would benefit from the opportunity to begin functioning in that world.

Discussion

Petitioner contends that Respondent Flour Bluff ISD, in deciding that Katie should be placed at the Regional Day School Program rather than at Flour Bluff Elementary, violated IDEA in three ways. First, Respondent did not decide Katie's educational placement on an individual basis. Second, the Regional Day School Program is not the least restrictive environment because it is not as close as possible to Katie's home. Third, the Regional Day School Program is not the least restrictive environment because Respondent failed to make available a continuum of alternative placements. Respondent contends that its placement decision fully complies with IDEA requirements.

This case revisits the issue raised in ***Amy F. v. China Springs Independent School District***, 21 IDELR 468; 129-SE-194 (April 22, 1994). In the present case, as in Amy F., a deaf child's desire to attend the school closest to her home conflicts with her school districts desire to place her in a centralized program at a distant school.

Katie has the burden of proof because she is challenging her current IEP that places her in the Regional Day School Program. ***Tatro v. The State of Texas***, 703 F.2d 823, *aff'd in part and rev'd in part sub. nom.*, ***Irving Independent School District v. Tatro***, 468 U.S. 883 (1984).

Before addressing the merits of the case, it is necessary to resolve an evidentiary issue that was taken under advisement at the hearing.

I. Access to Teachers and Records by District's Expert

At the hearing, Respondent offered the testimony of Dr. Mark Bernstein, an expert witness who observed Katie at school, interviewed her teachers and administrators, and examined her school records. Petitioner objected to his testimony on the ground that absent parental consent, the expert's actions violated the Family Educational Rights Privacy Act (FERPA), 20 U.S.C. §1232. Taking the objection under advisement, the Hearing Officer allowed Dr. Bernstein to testify, subject to his testimony being stricken if the objection were ultimately sustained.

The Hearing Officer now overrules Petitioner's objection, finding that the expert's actions did not violate FERPA. Educational records may be released without parental consent to school officials having a legitimate educational interest. 20 U.S.C.A. §1232g(b)(1)(A). Federal regulations permit disclosure of information without parental consent to

school officials whom the district determines have a legitimate educational interest. 34 C.F.R. §99.31.

Pursuant to federal statute and regulation, Flour Bluff adopted a local policy that defines school officials" to include attorneys, consultants, and independent contractors. Under this local policy, Respondents expert becomes a school official" and under FERPA is allowed access to Katie's records without parental permission. ***See, Brazosport (TX) Independent School District***, 16 EHLR 908 (U.S. Dep't of Educ., Off. for Civil Rights, 1990) the release of confidential information to an educational consultant was appropriate); ***Presto***, 13 EHLR 213:121 (U.S. Dep't of Educ., Off. of Special Educ. Programs, 1988) (disclosure to an expert witness is appropriate if the expert is an agent or employee of the school agency).

II. Placement Decisions on an Individual Basis

Katie contends that Respondent failed to decide her educational placement on an individual basis. Respondent contends that its decision to place Katie in a centralized program is based on her identified, individualized needs.

One of IDEA's guiding principles is that decisions concerning disabled students must be individualized. 20 U.S.C. §1412 et q. The official comment to the federal regulation governing educational placement states: "The overriding rule in this section is that placement decisions must be made on an individual basis." 34 C.F.R. 300.552, Note.

The Hearing Officer reviewed both a tape recording and a transcription of the December 15, 1994 ARD that denied Katie's request to transfer from the Regional Day School Program to Flour Bluff Elementary. At the ARD, Flour Bluff ISD was represented by Lois Ann Stephenson, Diagnostician, who later testified at the due process hearing. The ARD also included personnel from the Regional Day School Program. Both Flour Bluff ISD and Katie were represented by counsel. Based on a review of the ARD tape and transcript, the Hearing Officer identified four factors that the ARD considered in denying Katie's transfer request:

> (1) the comprehensiveness of the Regional Day School Program;
>
> (2) unlike Flour Bluff Elementary, which has no deaf students, the Regional Day School Program offers Katie the opportunity for relationships with non-hearing as well as hearing peers;
>
> (3) the Regional Day School Program offers Katie the opportunity to use different interpreters; and
>
> (4) a placement at Flour Bluff Elementary would not provide Katie an educational benefit superior to the benefit she receives from the Regional Day School Program.

When an ARD decision is reviewed, the analysis must be an individualized, fact-specific inquiry. This analysis requires

careful examination of the nature and severity of the student's disability, her needs and abilities, and the school district's response to the student's needs. After closely scrutinizing the four factors that the ARD cited to support its decision, the Hearing Officer finds that these factors fail to justify the decision.

No one disputes the comprehensiveness of the Regional Day School Program. Katie, however, disputes her need for a comprehensive program. The ARD agreed that the services Katie currently uses are interpreter, speech therapist, and audiologist. In addition, she requires preferential seating and note taking.

Katie's third-grade teacher, Ms. Margaret McGaffee, attended the December 1994 ARD and expressed her views concerning Katie's abilities (Ms. McGaffee was not a voting member of the ARD). Ms. McGaffee believed that if Katie were given only three things -- an interpreter, preferential seating, and note taking -- she could succeed at Flour Bluff Elementary:

> [S]he's an exceptional student. And she does all of her work some days without interpreters, as I stated last time. It's just when we go over new concepts, we have to have an interpreter there. ... I feel like she could be successful at any campus if she had the three things she needs, which is an interpreter, note-taking, and correct seating.

Ms. McGaffee stated that in her class Katie was given these three things and was a straight-A student.

The Hearing Officer is particularly persuaded by Ms. McGaffee's statements at the ARD. Ms. McGaffee, a regular education teacher with neither training nor experience in teaching disabled students, had no difficulty successfully teaching Katie. Furthermore, Ms. McGaffee's contact with Katie was more recent than any other educator at the ARD.

During the ARD, school officials repeatedly stated that Katie needed and benefitted from the comprehensiveness of the Regional Day School Program. One ARD member admitted, however, that Katie received no direct instruction from the Program:

> Katie's needs as they are being met at Calk ... involve the speech therapy and interpreter services, ***educationally, no, that she doesn't have any direct instruction at all from the Regional Program.***

(ARD T., pp. 15) (emphasis added).

One ARD member expressly stated that "[m]y vote is not based on her ability" because "I see no problem with those skills." (ARD T., pp. 13). Another ARD member indicated regardless of Katie's skills and abilities, "[i]t's not really a matter of earning her way back to the home campus" because the Regional Day School Program is designed for deaf students. (ARD T., pp. 1314). These two ARD members based their

decision on the ability of the Regional Day School Program to respond to unexpected problems that might arise. (ARD T., pp. 13, 15).

School officials believed that Katie indirectly benefitted from the Regional Day School Program, even if educationally she was not using it. The ARD tape and transcript clearly show that school officials thought Katie needed the whole Regional Day School Program even if she was not currently using it. The Hearing Officer finds this justification unpersuasive.

The ARD cited the availability of deaf education teachers at the Regional Day School Program. Katie's current IEP includes no services from a deaf education teacher, and Ms. McGaffee found it unnecessary to use a deaf education teacher. No one disputes the appropriateness of Katie's current IEP, so the availability of deaf education teachers is irrelevant.

Besides the comprehensiveness of the Regional Day School Program, the ARD thought that the Program provided Katie the opportunity for relationships with non-hearing students as well as hearing students. The ARD was concerned that Flour Bluff Elementary, with no deaf students, offered Katie no opportunity to interact with other students who sign.

Having presided at two hearings concerning deaf students, the Hearing Officer recognizes their need to socialize with other deaf students. Katie's situation is unusual, however, in that she has many out-of-school opportunities to socialize with deaf children and adults. In addition, her home life presents

unique opportunities. She shares her home with a deaf adult who signs and a hearing adult who signs and runs an interpreter service for the deaf.

At the hearing, Respondent's expert testified that deaf adults frequently report that their school experience made them feel "like they are an island in this sea of hearing children." Concerns that Katie would be isolated at Flour Bluff were dispelled by Ms. McGaffee's description of Katie's extensive involvement with hearing students. Ms. McGaffee is confident that Katie would make friends at Flour Bluff because Katie is capable of vocalizing and currently socializes with hearing students.

School officials also expressed concern about Katie transferring in the middle of a school year. Katie's mother agreed, and at the hearing she requested that Katie's transfer be delayed until the 1995-96 school year.

Another factor cited by the ARD is the desirability of using multiple interpreters, which the Regional Day School Program offers. At the hearing, however, Katie's mother testified that Katie used only a single interpreter. There was no testimony that Katie used more than one interpreter. Although using more than one interpreter may be ideal, there is no evidence that the Regional Day School Program provided this particular benefit to Katie.

The final factor the ARD considered is whether Flour Bluff could offer a program superior to the Regional Day

School Program. This inquiry is misguided because it focuses on comparing programs and services, not on addressing a student's individual needs. Under this analysis, a home campus could never offer a superior program unless it created its own regional day school program. The ARD's inquiry should have focused on Katie's individual needs and the feasibility of Flour Bluff Elementary meeting those needs.

From the ARD transcript, it is apparent that the ARD's focus was on the qualities and characteristics of the Regional Day School Program, not on the qualities and characteristics of Katie. Rather than developing a placement to fit the student, the ARD wanted the student to fit a pre-existing placement. The ARD failed to consider her individual needs, thereby violating IDEA's requirement that placement decisions be made on an individual basis.

At the due process hearing, Flour Bluff advanced four additional reasons for denying Katie's transfer request:

> (1) the unavailability of an interpreter to implement Katie's IEP at Flour Bluff Elementary;
>
> (2) itinerant audiologist services at Flour Bluff Elementary would be less desirable than having an audiologist available daily at the Regional Day School Program; (3) deficiencies in Katie's communication skills; and

(4) the cost of implementing Katie's IEP at Flour Bluff Elementary.

There was conflicting evidence concerning the availability of interpreters. School officials testified that finding an interpreter and developing a training/monitoring program would be difficult. Katie's mother, who owns an interpreter service, testified that the position could be filled and a training/monitoring program developed. Indeed, she suggested that the training/monitoring program she developed for the Regional Day School Program could be used as a model.

The Hearing Officer was particularly persuaded by evidence that the Regional Day School Program always fills its interpreter positions. Also persuasive was the testimony of Katie's mother, who has first-hand knowledge about the availability of interpreters.

Katie uses an audiologist to check her audio equipment. Katie herself checks the equipment every morning, and her equipment has never failed. The audiologist at the Regional Day School Program currently serves Flour Bluff students on an itinerant basis, and the Parties agree that an itinerant audiologist could satisfy Katie's IEP. Respondent maintained, however, that Katie would be better off having an audiologist available daily rather than on an itinerant basis. This factor provides an insufficient basis to deny Katie's transfer request.

At the hearing, Respondent's expert, Dr. Mark Bernstein, testified that Katie's communication deficiencies,

identified by her March 1994 evaluation, support the conclusion that Katie needs the comprehensiveness of the Regional Day School Program. Specifically, Dr. Bernstein testified that Katie needed a deaf education teacher to be available half a day every day.

When creating Katie's IEP, the ARD possessed the results of her March 1994 evaluation. Nevertheless, the ARD amended her IEP to remove services from a deaf education teacher. For Respondent to now contend that Katie needs a deaf education teacher would be tantamount to admitting that Katie's IEP is not appropriate. Respondent cannot have it both ways. Under these circumstances, the Hearing Officer gives no credence to the claim that Katie's communication deficiencies justify denying her transfer request.

The final factor Respondent advanced is that implementing Katie's IEP would be more costly at Flour Bluff Elementary than at the Regional Day School Program. Respondent contends that it should be allowed to use the centralized program to save money. No evidence was presented about the difference in cost between these two placements.

Cost is always a valid factor for school districts to consider. Congress did not intend for schools to furnish "every special service necessary to maximize each student's potential." ***Hendrick Hudson District Board of Education v. Rowley***, 458 U.S. 176, 102 S.Ct. at 3034, 3047, 73 L.Ed.2d 690 (1982). At the same time, however, cost must be balanced against other considerations.

Two courts of appeals offer guidance for striking a balance between cost and other considerations. An Eleventh Circuit case involved a student who requested mainstreaming and a school district that wanted placement in a self-contained classroom. In addressing the cost of mainstreaming, the court stated:

> [A] school district may [not] decline to educate a handicapped child in a regular classroom because the cost of doing so, with appropriate supplemental aids and services, would be incrementally more expensive than educating the child student in a self-contained special education classroom. ... If the cost of educating a handicapped child in a regular classroom is so great that it would significantly impact upon the education of other children in the district, then education in a regular classroom is not appropriate.

Greer v. Rome City School District, 950 F.2d 688 (llth Cir. 1991), *remanded on other grounds*, 956 F.2d 1025, *aff'd*, 967 F.2d 470 (llth Cir. 1992).

In another mainstreaming case, the Sixth Circuit addressed the relationship between cost and other considerations. The court observed that cost is a factor to consider because excessive spending on one student deprives other students. However, "cost is no defense ... if the school district has failed to use its funds to provide a proper continuum of alternative placements for [disabled] children. The provision for alternative placements benefits all [disabled] children."

Roncker v. Walter, 700 F.2d 1058 (6th Cir. 1983), *cert. den'd*, 104 S.Ct. 196 (1983).

The cost of providing Katie an interpreter at Flour Bluff Elementary is a valid consideration, but cost alone is not always the determining factor. The decision concerning Katie's placement must be based on her individualized needs and the parameters of the least restrictive environment. Apart from cost, Respondent advances no factor that would justify its denial of Katie's transfer request. Absent evidence that the cost of providing an interpreter at Flour Bluff Elementary is "so great that it would significantly impact upon the education of other children in the district," ***Greer v. Rome City School District***, the Hearing Officer finds that Flour Bluff cannot use cost alone as the determining factor in denying Katie's transfer request.

III. Least Restrictive Environment

A. Close-to-Home Placement Provisions

School districts are required to provide disabled students a free appropriate public education in the least restrictive environment. 20 U.S.C. §§ 1400 et g. (Individuals With Disabilities Education Act); ***Board of Education v. Rowley***, 458 U.S. 176 (1982). States must adopt procedures to ensure, to the maximum extent possible, that disabled students are educated with nondisabled students. 20 U.S.C. §1412(5)(B); 19 Tex. Admin. Code §89.218; ***Daniel R.R. v. State Board of Education***, 874 F.2d 1036, 1043-48 (5th Cir. 1989); ***Schuldt***

v. Mankato Independent School District, 937 F.2d 1357 (8th Cir. 1991).

A federal regulation interpreting the Individuals With Disabilities Education Act (IDEA) and governing placement decisions provides that school districts "shall ensure that ... [t]he educational placement of each child with a disability ... [i]s as close as possible to the child's home." 34 C.F.R. §300.552. The official comment to this regulation provides that "among the factors to be considered in placing a child is the need to place the child as close to home as possible." 34 C.F.R. §300.552, Note.

This regulation and comment appear under the title "Least Restrictive Environment." Having reviewed the regulations and the caselaw, the Hearing Officer concludes that mainstreaming and close-to-home placement are two distinct components of least restrictive environment (LRE).

Courts interpreting the close-to-home placement provisions uniformly hold that placing a child as close as possible to home is not an absolute obligation. School districts, however, must consider this factor. ***Schuldt v. Mankato Independent School District***, 937 F.2d 1357 (8th Cir. 1991); ***Barnett v. Fairfax County School Board***, 927 F.2d 146 (4th Cir. 1991).

Especially with deaf and hearing-impaired students, many school districts centralize special education services rather than provide them at each student's home campus. Some courts

hold that centralization decisions are administrative determinations better left to educators and therefore unreviewable by the courts. ***E.g.*, *Barnett v. Fairfax County School Board***, 927 F.2d 146 (4th Cir. 1991) .

The Hearing Officer agrees that school districts have wide latitude in deciding whether and to what extent to centralize services. At the same time, however, a decision to centralize could violate the least-restrictive-environment requirement of IDEA, including the close-to-home component. If such decisions were unreviewable, school districts could disregard the close-to-home provisions with impunity. Surely that is not the intent of the regulations. Students claiming an LRE violation are entitled to judicial review, and the Hearing Officer concludes that IDEA requires such review.

One issue presented in this case is whether the school district discharged its legal obligation to "consider" close-to-home placement. To resolve this issue, one must define the term "consider." In the context of these regulations, the Hearing Officer concludes that the most applicable dictionary definition is "[t]o think about carefully and seriously." American Heritage Dictionary (2d ed. 1982).

Applying this definition of 'consider" to the facts of the present case, the Hearing Officer concludes that the ARD failed to "consider" Katie's placement at her home campus in Flour Bluff. Due to Katie's exceptional abilities, she presented a strong candidacy for return to her home campus. It is apparent

from the ARD transcript, however, that the ARD thought about this issue neither "carefully" nor "seriously."

It would not be an exaggeration to summarize the ARD's reasoning as follows: (1) Katie is deaf; (2) the Regional Day School Program provides a comprehensive program for deaf students; (3) therefore, Katie should go to the Regional Day School Program. The feasibility of returning Katie to her home campus was never discussed seriously. Moreover, nothing in the transcript suggests that the ARD thought either carefully or seriously about the feasibility of Katie's return.

Neither the courts nor IDEA provide any substantive standards for reviewing alleged violations of the close-to-home provisions, or for resolving the conflict between the regulatory preference for close-to-home placement and a district's desire to centralize special education services. This issue is particularly difficult in light of the apparent tension between the close-to-home preference and the Congressional decision to leave the selection of educational programs, policy, and methods to local school officials. ***Board of Education v. Rowley***, 458 U.S. 176 (1982); ***Daniel R.R. v. State Board of Education***, 874 F.2d 1036, 1043-48 (5th Cir. 1989).

Respondent argues that the close-to-home provisions impose no obligation on school districts to place students in the school closest to their home. Respondent further argues that school districts may consider the benefits of centralizing services for hearing-impaired students; districts may also

consider the cost of implementing a student's IEP at the school closest to home.

In support of its position, Respondent cites several cases with similar facts. ***Barnett v. Fairfax County School Board***, 927 F.2d 146 (4th Cir. 1991); ***Lachman v. Illinois St. Bd. of Educ.***, 852 F.2d 290, 292 (7th Cir. 1988), *cert. den'd*, 109 S.Ct. 308 (1988); ***Urban v. Jefferson County School District R-1***, 870 F.Supp. 1558 (D.C. Co. 1994).

In ***Barnett***, the school district provided deaf education services in a centralized location, but Barnett requested that these services be provided at his home school. Barnett sought to duplicate "a highly specialized educational program." The Fourth Circuit held that a district is not required to duplicate a student's program merely because there exists a school closer to his home.

Respondent contends that there is no requirement to duplicate Katie's program "in light of the scarcity of highly-trained personnel and resources, the small number of students in the program, and the educational advantages of centralization." ***Barnett***, 927 F.2d at 149.

Respondent also relies upon ***Lachman v. Illinois St. Bd. of Educ.***, 852 F.2d 290, 292 (7th Cir. 1988), *cert. den'd*, 109 S.Ct. 308 (1988). Lachman involved a self-contained deaf student. The school district proposed a centralized program using the total communication method. Lachman disagreed, requesting a close-to-home placement using the cued speech

method. The Seventh Circuit held that once a district provides a student a free appropriate public education, the choice of methodology is left to the school. ***Lachman*** at 1087-88; EHLR Dec. 559:104.

In addressing the conflict between a district's desire to centralize services and the regulatory preference for close-to-home placement, most courts apply a balancing test. The most recent case to discuss relevant factors is ***Urban v. Jefferson County School District R-1***, 870 F.Supp. 1558 (D.C. Co. 1994). The factors cited in Urban were the qualifications and certifications of teaching staff, the student-teacher ratio, the appropriateness of physical facilities, the number of students utilizing the program, and the educational advantages of utilizing the program. ***Urban v. Jefferson County School District R-1***, 870 F.Supp. 1558.

In two major respects, the cases cited by Respondent are distinguishable from the present case. First, all the cited cases involve students who required extensive services and requested duplication of their labor-intensive centralized program at their close-to-home school. ***see Barnett***, ***Lachman***, ***Pinkerton***, and ***Urban***. Second, all the cited cases except ***Barnett*** involve students with severe academic deficiencies.

The Hearing Officer could find no case involving facts similar to the present case: a student who does not seek duplication of the centralized program, who is academically at or above grade level, and who has a comprehensive social and emotional support system.

To resolve the issue presented, the Hearing Officer adopts a balancing test, the analytical approach generally used by courts in related cases. Applying the balancing test to the present case involves considering: (1) the feasibility of implementing Katie's 1994-95 IEP at Flour Bluff Elementary; (2) the factors relied upon by Respondent to deny Katie's request to attend Flour Bluff Elementary; and (3) the regulatory preference for close-to-home placement.

Considering the prominent placement in the federal regulations of the close-to-home provisions, the Hearing Officer concludes that this factor is to be accorded significant weight. The close-to-home provisions, however, do not mandate placement at the school closest to the student's home. If the IEP requires a different placement, or if the close-to-home factor is outweighed by other factors, the school district may place the student at a distant campus.

In the present case, the Hearing Officer concludes that it is feasible to implement Katie's IEP at Flour Bluff Elementary. Such implementation primarily requires that Respondent provide Katie an interpreter, contract for itinerant audiologist services, and arrange for speech therapy, note taking, and preferential seating. The Hearing Officer already reviewed the factors relied upon by Respondent to justify Katie's placement on a distant campus. Based on this review, the Hearing Officer concludes that none of these factors, either individually or collectively, is sufficient to outweigh the regulatory preference for close-to-home placement. Accordingly, the Hearing Officer

finds that the Regional Day School Program is not the least restrictive environment for Katie.

B. Continuum of Alternative Placements

The federal regulation governing the continuum of alternative placements provides:

> (a) Each public agency shall ensure that a continuum of alternative placements is available to meet the needs of children with disabilities for special education and related services.

34 C.F.R. §300.551. This regulation, like the close-to-home provisions, appears under the title "Least Restrictive Environment." The Hearing Officer concludes that the continuum of alternative placements is a third distinct component of least restrictive environment.

Courts have been critical of school districts that fail to provide a continuum of alternative placements. In Greer, the Eleventh Circuit criticized a school district for failing to consider a range of options at the ARD:

> It is significant that neither the transcripts and minutes of the placement committee meetings nor the proposed IEP indicate that school officials considered any options other than the two extremes presented by the parties.

Greer v. Rome City School District, 950 F.2d 688 (llth Cir.

1991), *remanded on other grounds*, 956 F.2d 1025, *aff'd*, 967 F.2d 470 (llth Cir. 1992).

The Eleventh Circuit emphasized that the ARD process is the time to discuss the continuum of alternative placements:

> It is during this IEP] developmental process that school officials should consider the full range of supplemental aids and services that may be provided in conjunction with regular classroom education, and they should share these considerations with the child's parents at the IEP meeting.

Greer v. Rome City School District, 950 F.2d 688 (llth Cir. 1991).

The Sixth Circuit considered the continuum of alternative placements to be so important that failure to provide a proper continuum deprived a school district of the "cost defense." ***Roncker v. Walter***, 700 F.2d 1058 (6th Cir. 1983), *cert. den'd*, 104 S.Ct. 196 (1983).

In another case the parents contended that the school district had failed to provide a continuum of alternative placements. The court rejected the contention because the ARD record reflected that alternative placements were discussed at the ARD. ***Bonnie Ann F. v. Calallen Independent School District***, 835 F.Supp. 340 (S.D. Tex. 1993), *aff'd*, 40 F.3rd 386 (5th Cir. 1994).

In the present case, as in Greer, the ARD transcript reflects that school officials failed to provide a continuum of alternative placements. Katie requested placement at Flour Bluff Elementary, and school officials insisted that the Regional Day School Program was the proper placement. During the ARD, school officials made no attempt to explore other alternatives. This failure violated the continuum of alternative placements, which is an essential component of least restrictive environment.

IV. Conclusion

In conclusion, the Hearing Officer finds that Respondent violated IDEA by not basing Katie's placement decision on her individualized needs. Respondent violated the least restrictive environment by placing Katie at a distant campus rather than the school closest to her home, and by not providing a continuum of alternative placements.

Conclusions of Law

1. Katie is eligible for special education services from Flour Bluff ISD under the classifications of auditory and speech handicapped. 20 U.S.C. §1401; 34 C.F.R. §300.7(b)(3) and (11); 19 Tex. Admin. Code §89.211(c) and (i).

2. Katie has the burden of proof because she is challenging her current IEP. ***Tatro v. The State of Texas***, 703 F.2d 823, ***aff'd in part and rev'd in part sub. nom., Irving Independent School District v. Tatro***, 468 U.S. 883 (1984).

3. 34 C.F.R. §300.552 lists factors that school districts must consider in deciding the location of a student's educational placement. ***Schuldt v. Mankato Independent School District***, 937 F.2d 1357 (8th Cir. 1991); ***Barnett v. Fairfax County School Board***, 927 F.2d 146 (4th Cir. 1991).

4. Katie's 1994-95 IEP placement was not based on her individual needs. ***Daniel R. R. v. State Board of Education***, 874 F.2d 1036 (5th Cir. 1989); 20 U.S.C. §1412; 34 C.F.R. §§300.550-553; 19 Tex. Admin. Code §89.235.

5. Katie's 1994-95 educational placement violated the least restrictive environment by placing her at a distant campus rather than at a school as close to her home as possible. 34 C.F.R. §300.552.

6. Respondent failed to make available to Katie a continuum of alternative placements. 34 C.F.R. §300.551.

7. In determining whether a school district considered the factor of placing a student as close as possible to home, the term "consider" means "to think about carefully and seriously." The ARD failed to consider placing Katie at the school as close as possible to her home.

ORDER

Based upon the evidence and the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that

Petitioner's request for a transfer to Flour Bluff Elementary for the 1995-96 school year is **GRANTED**.

It is **FURTHER ORDERED** that Respondent convene an ARD Committee meeting no later than May 1, 1995 to arrange for the implementation of this Order.

Finding that the public welfare requires the immediate effect of this Final Decision, the Hearing Officer makes it effective immediately.

SIGNED this 3rd day of April, 1995.

Olivia B. Ruiz
Special Education Hearing Officer

NOTICE TO THE PARTIES

Under newly revised State Board of Education rules, it is no longer necessary for a party to perfect an appeal to state district court by filing a Motion for Re-Hearing. However, either party may request, within ten (10) days after the date of this decision, specified additional or amended findings of fact or conclusions of law. 19 TAC §157.8(n)(o).

20 U.S.C. Chapter 33

SUBCHAPTER I—GENERAL PROVISIONS

Sec. 1400 Congressional statements and declarations

(a) Short title

This chapter may be cited as the "Individuals with Disabilities Education Act".

(b) Findings

The Congress finds that—

(1) there are more than eight million children with disabilities in the United States today;

(2) the special educational needs of such children are not being fully met;

(3) mote than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;

(4) one million of the children with disabilities in the United States are excluded entirely from the public school system and will not go through the educational process with their peers;

(5) there arc many children with disabilities throughout the United States participating in regular school programs whose disabilities prevent them from having a successful educational experience because their disabilities are undetected;

(6) because of the lack of adequate services within the public school system, families ale often forced to find services outside the public school system, often at great distance from their residence and at their own expense;

(7) developments in the training of teachers and in diagnostic and instructional procedures and methods have advanced to the point that, given appropriate funding, State and local educational agencies can and will provide effective special education and related services to meet the needs of children with disabilities;

(8) State and local educational agencies have a responsibility to provide education for all children with disabilities, but present financial resources are inadequate to meet the special educational needs of children with disabilities; and

(9) it is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of children with disabilities in order to assure equal protection of the law.

(c) Purpose

It is the purpose of this chapter to assure that all children with disabilities have available to them, within the time periods specified in Sec. 1412(2)(B) of this tile, a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their patents or guardians are protected. to assist States and localities to provide for the education of all children with disabilities, and to assess and assure the effectiveness of efforts to educate children with disabilities.

(Pub. L. 91-230. title VI, Sec. 601, Apr. 13, 197, 84 Stat. 175; Pub. L. 9-142, Sec. 3(a), Nov. 29, 1975, 89 Stat. 774; Pub. L. 101-476, title IX, Sec. 901(a)(1), (b)(1)-(9), 0ct. 30, 1990, 104

Stat. 1141, 1142; Pub. L. 102-119, Sec. 25(b), Oct. 7, 1991, 105 Stat. 607.)

§ 1401(20) The term "individualized education program" means a written statement for each child with a disability developed in any meeting by a representative of the local educational agency or an intermediate educational unit who shall be qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, the teacher, the parents or guardian of such child, and, whenever appropriate, such child, which statement shall include—

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs,

(D) a statement of the needed transition services for students beginning no later than age 16 and annually thereafter (and, when determined appropriate for the individual, beginning at age 14 or younger), including, when appropriate, a statement of the interagency reponsibilities[32] or linkages (or both) before the student leaves the school setting,...

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[32] So in original. Probably should be "responsibilities".

Sec. 1412 Eligibility requirements

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met: [emphasized by Petitioner]

(I) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

(2) The State has developed a plan pursuant to Sec. 1413(b) of this title in effect prior to November 29, 1975, and submitted not later than August 21, 1975, which will be amended so as to comply with the provisions of this paragraph. Each such amended plan shall set forth in detail the policies and procedures which the State will undertake or has undertaken in order to assure that—

(A) there is established

(i) a goal of providing full educational opportunity to all children with disabilities,

(ii) a detailed timetable for accomplishing such a goal, and

(iii) a description of the kind and number of facilities, personnel. and services necessary throughout the State to meet such a goal;

(B) a free appropriate public education will be available for all children with disabilities between the ages of three and eighteen within the State not later than September 1,1978, and for all children with disabilities between the ages of three and twenty-one within the State not later than September 1,1980, except that, with respect to children with disabilities aged three

to five and aged eighteen to twenty-one, inclusive, the requirements of this clause shall not be applied in any State if the application of such requirements would be inconsistent with State law or practice. or the order of any court, respecting public education within such age groups in the State;

(C) all children residing in the State who are disabled, regardless of the severity of their disability, and who are in need of special education and related services a identified, located and evaluated, and that a practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children ate not currently receiving needed special education and related services;

D) policies ant procedures are established in accordance with detailed criteria prescribed under Sec. 1417(c) of this title; and

(E) any amendment to the plan submitted by the State required by this section shall be available to parents, guardians. and other members of the general public at least thirty days prior to the date of submission of the amendment to the Secretary.

(3) The State has established priorities for providing a free appropriate public education to all children with disabilities, which priorities shall meet the timetables set forth in clause (B) of paragraph (2) of this section, first with respect to children with disabilities who are not receiving an education, ant second with respect to children with disabilities, within each disability category, with the most severe disabilities who are receiving an inadequate education, and has made adequate progress in

meeting the timetables set forth in clause (B) of paragraph (2) of this section.

(4) Each local educational agency in the State will maintain records of the individualized education program for each child with a disability, and such program shall be established, reviewed. and revised as provided in Sec. 1414(a)(5) of this title.

(5) The State has established

(A) procedural safeguards as required by Sec. 1415 of this title.

(B) procedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, and [emphasis by Petitioner]

(C) procedures to assure that testing and evaluation materials and procedures utilized for the purposes of evaluation and placement of children with disabilities will be selected and administered so as not to be racially or culturally discriminatory. Such materials or procedures shall be provided and administered in the child's native language or mode of communication, unless it clearly is not feasible to do so, and no single procedure shall be the sole criterion for determining an appropriate educational program for a child.

(6) The State educational agency shall be responsible for assuring that the requirements of this subchapter are carried out and that all educational programs for children with disabilities within the State, including all such programs administered by any other State or local agency, will be under the general supervision of the persons responsible for educational programs for children with disabilities in the State educational agency and shall meet education standards of the State educational agency. This paragraph shall not be construed to limit the responsibility of agencies other than educational agencies in a State from providing or paying for some or all of the costs of a free appropriate public education to be provided children with disabilities in the State.

(7) The State shall assure that

(A) in carrying out the requirements of this section procedures are established for consultation with individuals involved in or concerned with the education of children with disabilities, including individuals with disabilities and parents or guardians of children with disabilities, and

(B) there are public hearings, adequate notice of such hearings, and an opportunity for comment available to the general public prior to adoption of the policies, programs, and procedures required pursuant to the provisions of this section and Sec. 1413 of this tide.

(Pub. L. 91-231, title VI, Sec. 612, Apr. 13, 1970, 84 Stat. 178; Pub. L. 92-318, title IV, Sec. 421(b)(1)(C), June 23, 1972, 86 Stat. 341; Pub. L. 93-380, title VI, Secs. 614(b), (f)(1), 615(a), title VIII, Sec. 843(b), Aug. 21, 1974, 88 Stat. 581, 582, 611; Pub. L. 94-142, Secs. 2(a)(4), (c), (d), 5(a), Nov. 29, 1975, 89

Stat. 773, 774, 780; Pub. L. 98-199, Sec. 3(b), Dec. 2, 1983, 97 Stat. 1358; Pub. L. 99-457, title II, Sec. 203(a), Oct. 8, 1986, 100 Stat. 1158; Pub. L. 100-630, title I, Sec. 101(b), Nov. 7, 1988, 102 Stat. 3291; Pub. L. 101-476, title IX, Sec. 901(b)(33)-(46), (c), Oct. 30, 1990, 104 Stat. 1143-44, 1151; Pub. L. 102-119, Sec. 25(a)(5), (b), Oct. 7, 1991, 105 Stat. 606, 607.)

§ 1414*(d)* *Special education and related services provided directly by State educational agencies; regional or State centers*

Whenever a State educational agency determines that a local educational agency—

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more children with disabilities who can best be served by a regional or State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate ***except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.*** [Emphasized by Petitioner.]

Sec. 1415 Procedural safeguards

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their patents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include. but shall not be limited to—

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit—

(i) proposes to initiate or change, or

(ii) refuses to initiate or change, the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child_

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded—

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public) consistent with the requirements of Sec. 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to Sec. 1414(a)(12) of this title.

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without

regard to the amount in controversy. In any action brought under this paragraph the court shall receive the cords of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence. shall grant such relief as the court determines is appropriate.

(3)(A) Except as provided in subparagraph (B), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian other vise agree, the child shall remain in the then current educational placement of such child. or. if applying for initial admission to a public school. shall. with the consent of the parents or guardian. be placed in the public school program until all such proceedings have been completed.

(B)(i) Except as provided in clause (iii), if the proceedings conducted pursuant to this section involve a child with a disability who is determined to have brought a weapon to school under the jurisdiction of such agency, then the child may be placed in an interim alternative educational setting, in accordance with State law, for not more than 45 days.

(ii) The interim alternative educational setting described in clause (i) shall be decided by the individuals described in sec. 1401(a)(20) of this title.

(iii) If a parent or guardian of a child described in clause (i) requests due process hearing pursuant to paragraph (2) of subsection (b), then the child shall remain in the alternative educational setting described in such clause during the pendency of any proceedings conducted pursuant to this section. unless the parents and the local educational agency agree otherwise.

(iv) For the purpose of this section, the term "weapon" means a firearm as such term is defined in Sec. 921 of title 18. United States Code.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this section, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this section for services performed subsequent to the time of a written offer of settlement to a parent or guardian. if=

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or. in the case of an administrative proceeding. at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D). an award of attorneys' fees and related costs may be made

to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(E:) Whenever the court finds that=

(i) the parent or guardian. during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience. and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding, the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this section.

(G) The provisions of subparagraph (E) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C. 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under sections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

(Pub. L. 91-230, title VI, Sec. 615, as added Pub. L. 94-142, Sec. 5(a), Nov. 29, 1975, 89 Stat. 788 and amended Pub. L. 99-372, Secs. 2, 3, Aug. 5, 1986, 100 Stat. 796. 797; Pub. L. 100-630, title I, Sec. 102(e), Nov. 7, 1988, 102 Stat. 3294; Pub. L. 101-476, title IX, Sec. 901(b)(71)-(75), Oct. 30, 1990, 104 Stat. 1145; Pub. L. 102-119, Sec. 25(b), Oct. 7, 1991, 105 Stat. 607; Pub. 103-382, title III, Sec. 314(a)(1), Oct. 20, 1994, 108 Stat. 3936.)

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No. 96-826

In The

Supreme Court of the United States

October Term, 1996

KATHERINE M., by next friend,

LESA T.,

Petitioner,

vs.

FLOUR BLUFF INDEPENDENT SCHOOL DISTRICT,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SHIRLEY A. SELZ
Counsel of Record
GARY, THOMASSON, HALL & MARKS
Professional Corporation
Attorneys for Respondent
P.O. Box 2888
Corpus Christi, Texas 78403
(512) 884-1961

70345 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

QUESTIONS PRESENTED

Whether the Court of Appeals was correct in determining that Flour Bluff Independent School District did not violate the statutory rights of Petitioner, a deaf student, by exercising the policy choice to place her in a nearby regular elementary school with state-supported centralized services for deaf students and where Petitioner actually received appropriate services from school staff specially trained and experienced to serve her needs, and where:

1. 20 U.S.C. 1414(d)(3) specifically authorizes the state to provide direct services and, as a corollary, the local school district has a right to access such services for a child;

2. the Court of Appeals rejected Petitioner's argument that *Daniel R. R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989) (a mainstreaming case) controls, and instead relied on applicable statutes, regulations, and appellate opinions directly addressing the placement issue in this case; and

3. there was no issue in this case about whether Petitioner received appropriate supplemental aids and services in a mainstream setting.

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No. 96-826

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

KATHERINE M., by next friend,

LESA T.

Petitioner,

vs.

FLOUR BLUFF
INDEPENDENT SCHOOL DISTRICT,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondent requests the Court to deny the petition for writ of certiorari. The Court of Appeals' decision is consistent with applicable statutes, regulations, and decisions of the

Circuits which have ruled on the issue upon which Petitioner challenged her special education program.

OPINIONS BELOW

The Petition correctly identifies the opinions below.

JURISDICTION

This Court has jurisdiction under 20 U.S.C.A. § 1415(e)(2) and 28 U.S.C.A. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are listed below. The text is set out in the Appendix to this brief, except those which are set out in the Petition are not duplicated in this brief.

20 U.S.C.A. § 1401(a)(1)(A)(i)
20 U.S.C.A. § 1401(a)(16)(17)(18)(20)
20 U.S.C.A. § 1412(2)(B) and (5)(B)
20 U.S.C.A. § 1414(d)(3)
20 U.S.C.A. § 1415(b)(2) and (e)(2)
34 C.F.R. § 300.552
Tex. Educ. Code § 29.301, § 30.081
19 Tex. Admin. Code § 89.1050

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below.

This is a special education case under the Individuals

with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400, et seq, involving the "least restrictive environment" provision of the IDEA, 20 U.S.C.A. § 1412(5)(B). The single issue involves whether a deaf student's individualized education program must be implemented at her home school or whether it may be implemented at a nearby regular school where services specifically to address the student's educational needs are provided to the student.

Petitioner Katherine M. ("Katie"), who qualifies for services under the IDEA due to deafness,[1] initiated this proceeding through her mother, Lesa T., by requesting an administrative due process hearing under 20 U.S.C § 1415(b)(2), asserting she was denied her right to a free appropriate public education[2], stating as her sole issue,

> "Katherine M.'s Least Restrictive Environment would be her home campus in the Flour Bluff I.S.D. She is not being allowed to attend her home school."

(R. Ex. 10 at 79.)[3] Petitioner sought transfer to Flour Bluff Elementary School or, alternatively, to a private or parochial school at the expense of Flour Bluff Independent School District ("school district" or "Respondent"). (R. Ex. 10 at 37-38)

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[1] See 20 U.S.C.A. § 1401(a)(1)(A)(i)

[2] 20 U.S.C.A. § 1401(a)(18)

[3] The notations "R." refers to the record (including Volume and/or exhibit reference) in the District Court. The record includes the record of the administrative proceeding filed in the District Court pursuant to 20 U.S.C.A. § 1415(e)(2). The notation "Pet." refers to the Petition, and the notation "App. to Pet." refers to the Appendix to the Petition.

The special education hearing officer ordered Petitioner to be transferred to Flour Bluff Elementary School. (App. to Pet. at 35a-67a) Katie had been placed at Calk Elementary School, where she had received services by specially trained personnel provided by the state-supported Regional Day School Program for the Deaf. Flour Bluff Elementary School had no staff specially trained to serve Petitioner's deafness-related educational needs.

The school district sought judicial review. See 20 U.S.C.A. § 1415(e)(2). The District Court adopted much of the special education hearing officer's opinion and ordered Petitioner to be transferred from Calk Elementary School to Flour Bluff Elementary School despite the lack of trained service providers and despite the substantial additional financial cost of duplicating (or attempting to duplicate) services theretofore provided to Katie at Calk Elementary School by the Regional Day School Program for the Deaf. (App. to Pet. at 19a-34a)

The school district appealed. The Fifth Circuit Court of Appeals reversed. *Flour Bluff Independent Sch. Dist. v. Katherine M.*, 91 F.3d 689 (5th Cir. 1996) (reproduced in App. to Pet. at 1a-16a)[4]

B. Statement of Facts

Petitioner Katherine M. ("Katie") is a bright, academically successful child who receives special education services due to bilateral severe to profound sensorineural

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[4] Footnotes 1 through 29 to the Court of Appeals' opinion are misnumbered in the Appendix to the Petition as footnotes 2 through 30. Also, footnote 1 to the District Court's order is misnumbered in the Appendix to the Petition as footnote 31. (See App. to Pet. at 28a.)

hearing loss. (R. PX-3; R. Ex. 11 at 192) Katie lives in the City of Corpus Christi, Texas. Her home school district is Flour Bluff Independent School District which lies within the geographical boundaries of the city of Corpus Christi, Texas. Flour Bluff Independent School District has no neighborhood schools, but a single complex in which all school buildings are located. (R. Vol. 3 at 3) The school complex is approximately nine miles from Katie's home. (App. to Pet. at 14a)

The State of Texas provides support for services to deaf students in various regions throughout the state through a program called the Regional Day School Program for the Deaf ("RDSPD"). See Tex. Educ. Code 30.081, et seq.[5] The RDSPD is not a separate school or facility, but a state-supported program administered on a regional basis to provide educational services (academic instructors, interpreters, speech-language pathologists, counselors, audiologists, educational diagnosticians, and equipment) for deaf students in Texas schools. The State of Texas contracts with Corpus Christi Independent School District to provide services for deaf students in a multi-county area of South Texas. Itinerant services (excluding the services of interpreters and speech-language pathologists) are provided on a limited basis to schools within the region. (R. Ex. 11 at 134 (269-70))

Beginning at 18 months of age, Katie received services from RDSPD personnel. Instructional and related services were provided at Calk Elementary School, a school with RDSPD service providers on staff. Calk Elementary is a regular elementary school within Corpus Christi Independent School District. Flour Bluff Independent School District adjoins the

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[5] The Texas Education Code was redrafted effective May 30, 1995. The applicable statute prior to May 30, 1995, was Tex. Educ. Code § 11.10.

boundaries of Corpus Christi Independent School District. Calk Elementary is 17 miles from Katie's home, and Flour Bluff Elementary is about nine miles from her home. (App. To Pet. at 14a) Of the approximately 500 students enrolled in Calk Elementary in the 1994-95 school year, 31 students were deaf.

In addition to services provided to Katie by interpreters, speech-language pathologists, and audiologists, Katie also received direct instruction at Calk Elementary School from an RDSPD teacher of the deaf until the fall of 1994 when Katie was in the third grade. At that time, at Katie's mother's request and with the concurrence of the Admission, Review and Dismissal Committee,[6] direct instruction from the teacher of the deaf was discontinued and Katie was changed from partial mainstreaming[7] to full mainstreaming. Direct related services (as distinguished from direct instruction) continued and, as to speech therapy, were increased from 90 to 150 minutes per week. These services included a full-time interpreter, therapy by two speech-language pathologists, and hearing assessment and equipment maintenance by an audiologist. (App. to Pet. at 5a-6a)

The first planning team (ARD Committee) meeting in which placement was disputed occurred in December 1994.

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[6] The multi-disciplinary program planning team is referred to in Texas as the "Admission, Review, and Dismissal Committee" or "ARD Committee." Tex. Educ. Code § 29.301. (Vernon 1996); 19 Tex. Admin. Code. § 89.221 (amended and renumbered as 19 Tex. Admin. Code § 89.1050 effective September 1, 1996).

[7] The term "mainstream" is not used in IDEA, but is a shorthand description of the requirement in 20 U.S.C.A. § 1412(5) to educate disabled children, to the maximum extent appropriate, with children who are not disabled. See *Honig v. Doe*, 484 U.S. 305, 311, 108 S.Ct. 592, 597 (1988); *Daniel R.R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1039 (5th Cir. 1989).

Katie's mother requested the committee to transfer Katie from Calk Elementary School to Flour Bluff Elementary School. The Committee declined to do so, citing the comprehensiveness of the RDSPD services at Calk Elementary School; the opportunities at Calk Elementary for Katie to have relationships with both hearing and non-hearing peers; the opportunities at Calk to use different interpreters; and the lack of an educational benefit at Flour Bluff Elementary superior to the benefits from the RDSPD at Calk Elementary. (App. to App. at 6a-7a)

The ARD Committee's decision to continue placement of Katie at Calk Elementary School (17 miles from Katie's home) rather than Flour Bluff Elementary School (9 miles from Katie's home) led to the administrative and judicial proceedings under 20 U.S.C.A. § 1415(b)(2) and § 1415(e)(2). Katie alleged that placement at Calk Elementary School violated her right under the Individuals with Disabilities Education Act to a free appropriate public education because, she alleged, her placement was not the least restrictive environment. See 20 U.S.C.A. § 1412(5)(B).

Every witness with expertise and experience in teaching deaf children agreed that Katie's needs have been appropriately met at Calk Elementary School, that her needs will continue to be much better met in a school in which the RDSPD specialists can assist her, and that Katie should not be isolated as would be the situation at a Flour Bluff school. There was unanimous agreement among such experts that Calk Elementary School was a more appropriate placement than Flour Bluff Elementary School.

It is undisputed that Katie was on the academic honor roll at Calk Elementary School. Her success demonstrates that her educational needs were being met. See *Board of Educ., Etc.*

v. Rowley, 458 U.S. 176, 209-10, 102 S.Ct. 3034, 3052 (1982). As to classroom performance, Katie's teacher testified to her belief that Katie could be successful in any classroom with an interpreter, special seating, and assistance in note-taking.[8] However, there is no dispute about the in-classroom services provided to Katie or about whether Katie has the ability to succeed in different classrooms or schools.

The school district has never suggested that Katie will likely fail if the district were prohibited from placing her at a school where RDSPD specialists have provided services to Katie. Rather, it is the school district's position that Katie's ability to continue to excel is greatly enhanced if she continues to receive the best locally available services, and her opportunity is diminished if the school district is not permitted to place Katie at a school where the best locally available service providers (i.e., the RDSPD specialists) are located.

Access to highly trained specialists is especially critical at this stage of Katie's education. It is undisputed that the need to master more advanced language skills increases in each grade as the subject matter of academic classes becomes more abstract and more complex.

It is undisputed that certified interpreters and speech-language pathologists with special training for serving deaf students are very scarce in the Corpus Christi area. It is

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[8] The regular education third grade teacher in whose class Katie was mainstreamed had no special training or experience teaching deaf students. (App. to Pet. at 25a) She was not asked for and did not offer an opinion about the type or quality of special services provided to Katie at Calk Elementary School (interpreter, two speech-language pathologists, and audiologist) or about the type, quality or availability of service providers at Flour Bluff Elementary School, or about the relative benefits of placement in either school.

undisputed that speech-language pathologists comparable to those who provided speech and language therapy to Katie at Calk Elementary School are not available to Flour Bluff Independent School District due to scarcity of qualified personnel. (App. to Pet. at 12a-13a) It is undisputed that providing minimally adequate services to Katie on a Flour Bluff campus costs several times as much as providing superior services through RDSPD personnel at Calk Elementary School. (App. to Pet. at 27a-28a; R. Vol. 3 at 4-6)

C. Misstatements of Fact and Law in the Petition

There are so many misstatements of fact and law in the Petition that Respondent has collected them in the Appendix to this reply brief. Some of the particularly egregious misstatements are also addressed in Respondent's argument.

SUMMARY OF REASONS TO DENY THE WRIT

The writ should be denied. The bases upon which Petitioner requests the writ are misleading and are misstatements about the facts, about the law, and about the opinion of the Court of Appeals.

Petitioner asserts this Court should grant a writ because: (1) she interprets the opinion of the Court of Appeals to conflict with *Board of Educ., Etc. v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) (Pet. at 7-12); (2) she interprets the opinion of the Court of Appeals to conflict with *W.G. v. Bd. of Trustees of Target Range School D.*, 960 F.2d 1479 (9th Cir. 1992) (Pet. at 12); and (3) she asserts generally that the Court of Appeals misunderstands and/or misinterpreted the IDEA and

its importance (Pet. at 7-11), and the Court of Appeals' opinion lacks a rationale or legal basis (Pet. at 14). All of these assertions are wrong.

There is no conflict between the opinion of the Court of Appeals and *Rowley*. There is no conflict between the opinion of the Court of Appeals and *W.G.* Not only is the opinion of the Court of Appeals not in conflict with any cases cited by Petitioner, it is aligned with the opinions of Circuits which have addressed the same type of placement decision at issue in this case. Petitioner omitted any reference to precedential opinions cited by the Court of Appeals. Petitioner's assertions are contrary to the facts, contrary to the law, and contrary to the opinion of the Court of Appeals.

There is no reason to grant a writ in this case. The Court of Appeals has rendered a clear, well-reasoned opinion construing applicable statutes and regulations in a way that implements the purpose of the Individuals with Disabilities Education Act, that recognizes the policy choices and methodology decisions reserved for educators, that allows the school district to meet Katie's individual needs by choosing higher quality services at less cost, and that aligns the Fifth Circuit with other circuits which have construed the "least restrictive environment" issue in a similar context.

ARGUMENT TO DENY THE WRIT

Unlike her statement of issues in her Question Presented, in her argument, Katie states the issue before this Court as:

> "Are general convenience considerations of administrators to be given priority over the disabled child with his/her unique, individualized

needs?"

(Pet. at 10) General convenience of administrators has never been an issue in this case, and certainly was not the basis for any holding by the Court of Appeals.

Katie also identifies 20 U.S.C. § 1401(a)(20) as "a pivotal section in this case." (Pet. at 14) Section 1401(a)(20) defines the subject matters to be included in a child's individualized education program ("IEP"). However, Katie has not challenged the content of her IEP. She challenged only the location where the program is to be implemented.

The overall theme of the Petition is the false premise that Katie has one or more unspecified unaddressed educational needs related to her hearing disability, that this need or these needs were not being met at Calk Elementary School, that the Court of Appeals considered the failure to meet these unidentified educational needs as acceptable because it was administratively inconvenient to meet Katie's needs, and the Court of Appeals' opinion creates a conflict among the courts. Every component of this theme is contrary to the evidence and contrary to the opinion of the Court of Appeals.

1. Petitioner's assertion that her educational needs were subordinated to administrative convenience is untrue.

Although the source of the "administrative convenience" argument is unclear in the Petition, this argument possibly may be related to (but based on a misinterpretation of) the discretion of school officials to make policy choices and decisions about educational methodology. The discretion concerning policy and methodology is not to be confused with procedurally

"administratively convenient" decisions such as, e.g., skipping procedural steps in formulating a child's education program, or failing to provide proper notifications to parents.

Whether a service is needed and how a service should be provided involve substantive educational issues. As to substantive policy choices and methodology, this Court has stated:

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational methods most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child.
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> * * *
>
> We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." (Citation omitted) We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped.

Board of Educ., Etc. v. Rowley, 458 U.S. 176, 207-208, 102, S.Ct. 3034, 3051-52 (1982). The Court of Appeals expressed its appropriate role as:

> Congress left the choice of educational policies and methods where it properly belongs--in the hands of state and local school officials. Our task is not to second guess the state and local policy decisions; rather, it is the narrow one of determining whether state and local school officials have complied with the Act.

Flour Bluff Independent Sch. Dist. v. Katherine M., 91 F.3d 689, 693 (5th Cir. 1996), quoting *Daniel R. R. v. State Bd. Of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). (See App. to Pet. at 8a). Determinations about how to access and allocate scarce personnel resources and financial resources in order to provide needed services are issues of policy. The decision about whether to provide the specialized services Katie needs by placing Katie at a school with on-staff specialists or whether to duplicate on its campus those specific services which Katie needs is a policy issue. (App. to Pet. at 14a-15a) See also *Barnett v. Fairfax County School Bd.*, 927 F.2d 146, 152 (4th Cir. 1991), cert denied 502 U.S. 859, 112 S.Ct. 175 (1991). This important policy determination must not be trivialized and should not be misdescribed as "administrative convenience."

2. Placing Katie at a nearby regular school where the specific services required by her individualized education plan were provided to her at higher quality and less cost was a proper policy decision and did not violate the IDEA.

The State of Texas is authorized to make the policy decision to provide direct services to deaf students at centralized locations. 20 U.S.C.A. § 1414(d)(3). The local school district is authorized to make the policy decision to provide the specific services needed to address Katie's educational needs by either:

(a) placing Katie at the nearby school where state-supported specialists are available to deliver the IEP-required services to Katie at a low cost; or (b) placing Katie at her home school and hiring or contracting the personnel (to the extent at least minimally qualified personnel are available) to deliver the same IEP-required services.

Under either choice, Katie's individual educational needs are a function of the degree and severity of her disability, and the services required to address such needs are determined by Katie's ARD Committee. Upon determining the type and amount of services needed, the next question is the instructional setting (mainstream, segregated, or a combination of both) and location(s) where the services are to be provided. The Court of Appeals emphasized the separateness of the decision about the services to be provided and the decision about placement under the least restrictive environment analysis. (App. to Pet. at 9a) The ARD Committee's decision as to the location for delivery of services to Katie is the only issue on which this entire proceeding is based. Neither the content of her educational program nor the instructional setting is challenged.

Katie needs several (although not all) of the services provided by the state-supported specialists at the centralized school. Therefore, the ARD Committee may choose to provide for these services (interpreter, speech-language pathologists, and audiologist) by placing Katie at a nearby school where the specialists are located, or may provide for the services by placing Katie on her home campus if campus-based service providers are available and adequate. This choice involves an educational resource determination (availability and quality of service-providers) and a financial resource determination (relative cost of utilizing the state-supported specialists compared to direct hiring). Both resource determinations are

important policy considerations. (App. to Pet. at 14a-15a) Respondent did not violate Katie's rights by placing Katie at a school where she could receive better services at lower cost rather than placing Katie at her home school with less adequate services at greater cost.

The Petition confuses the concept of a student's educational needs that are to be addressed by special instructional and/or related services [9] with the concept of the instructional setting in which the services are delivered (i.e., the least restrictive appropriate environment)[10] and with the concept of transitional services[11] in preparation for the time when a student may need continued support from social agencies but has "aged out" of eligibility for special education services at age 21.[12] Katie's attempt to bootstrap the idea of preparation for post-school activities in her adult life when she will no longer be eligible for a school-provided interpreter, speech-language pathologist, or audiologist (See Pet. at 13) into a "need" not to continue access to these services now is preposterous. It is equally preposterous to suggest Katie has an educational "need" not to continue to receive such services in a nearby school where the trained specialists delivered services to Katie in accord with her IEP. It is illogical and educationally unsound to reduce the quality, quantity, or type of educationally-needed services for Katie so that Katie can learn to "sink or swim" in

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[9] See 20 U.S.C.A. § 1401(a)(16) and 1401(a)(17).

[10] 20 U.S.C.A. § 1412(5)(B).

[11] 20 U.S.C.A. § 1401(20)(D).

[12] 20 U.S.C.A. § 1412(2)(B).

anticipation that, as an adult, she will likely encounter little or no accommodations for her disability. It is also undisputed that Katie already has the ability to function in "real world" settings. (App. to Pet. at 22a-23a).

Nowhere in the Petition does Katie assert that a different or additional service was needed to address her disability-related educational needs. Nowhere does she assert that a service actually provided was inadequate or inappropriate. Nowhere does she assert the services provided (interpreter, speech therapy, and audiological services) were unneeded or somehow were not designed to meet her specific educational needs related to her deafness. Nowhere does she assert these same services would not be needed at Flour Bluff Elementary or any other school she may attend throughout her years in school. This case simply has nothing to do with unmet educational needs.

Katie asserts that her needs were not considered because she requires only some, but not all, of the types of services available to deaf students at Calk Elementary School. Katie theorizes that, because she does not receive direct instruction (as distinguished from services) or need all of the special services available from RDSPD specialists and because it is likely she has the ability to succeed academically at her home school, she is entitled to attend her home school and therefore Flour Bluff school district is required to provide on its campus whatever services Katie needs. This reasoning leads to the untenable result that a bright, successful student who needs deafness-related services but does not need direct instruction from a teacher of the deaf (i.e., the student is capable of mainstreaming) must be transferred from a regional school where highly qualified interpreters, specially trained speech-language pathologists, and other service providers are located and moved to the student's home school where such highly

qualified service providers are not available.

The dispute in this case turns on the school district's authority to choose a high-quality cost-effective method of providing specialized support services to meet Katie's language and communication needs caused by her deafness. That is, does federal law allow the school district to place Katie at a nearby school where state-provided specialists are available and have provided appropriate direct services to Katie in accord with the services specified in her individual education plan? The answer is "yes." Or does federal law prohibit the school district from accessing these special service providers and require the school district, instead, to attempt to duplicate on its own campus the services Katie needs despite the scarcity of trained specialists and despite the far greater cost? The answer is "no."

This case is about the location where special education services are to be provided to Katie. "The act and regulations promulgated thereunder give the school district discretion in selecting the location where it will educate a handicapped child." *Schuldt v. Mankato School Dist. 77*, 937 F.2d 1357, 1361 (8th Cir.), cert. denied, 502 U.S. 1059, 112 S.Ct. 937 (1992). The dispute does not concern the content of Katie's educational program because there is no dispute about the content. This case does not concern Katie's opportunity to be educated in an instructional setting which includes non-disabled students because she was mainstreamed with non-disabled students in a regular (not special) school. The only issue is whether the school district may provide services to meet Katie's needs by placing her at a nearby school which has specially-trained service providers on staff, or whether the services must be duplicated (or attempted to be duplicated) on Katie's home campus. The Court of Appeals correctly decided that Katie's rights were not violated by her placement at Calk Elementary

School where she received services required by her IEP.

3. Petitioner's accusations that the Fifth Circuit misinterpreted the IDEA and misapplied Supreme Court directives are misleading and wrong.

Petitioner's assertion that the opinion in *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036 (5th Cir. 1989)

> "illustrates the stalemate in the Fifth Circuit's reasoning . . . and their inability to grasp the importance of the clear purpose of the Act, and this Court's elucidation of same in *Rowley*"

(Pet. App. at 8), and her assertion that the Fifth Circuit "does not consider the IDEA of much importance," (Pet. at 9) are outrageous misstatements.

Petitioner's criticism of the *Daniel R. R.* opinion is not only a serious misdescription of the opinion, but is an unexplained change of position. Petitioner relied on *Daniel R. R.* at every prior stage of this case and argued to the District Court and to the Court of Appeals that the school district violated Katie's rights by failing to follow the *Daniel R. R.* procedures.

Daniel R. R. is the leading case in the Fifth Circuit on procedures for determining the appropriateness of removing a disabled child from the mainstream and providing instruction in

a segregated environment.[13] As part of the mainstreaming analysis, the Court of Appeals emphasized the difference between policy and methodology questions involving the instructional content of a child's educational program (for which educators have great discretion in substantive educational matters) and procedural issues regarding the instructional setting in which a child's substantive educational program is implemented (for which Congress expressed a preference for mainstreaming). 874 F.2d at 1044.

The Court of Appeals made it clear that it rejected Petitioner's reliance on *Daniel R. R.* and emphasized that this is not a mainstreaming case. (App. to Pet. at 9a) Nevertheless, even though the Court of Appeals explained that *Daniel R. R.* and the other mainstreaming cases on which Petitioner relied are not controlling, Petitioner misrepresents to this Court that "the only case law upon which the opinion is based is *Daniel R. R.*" (Pet. at i ¶ 2) and "The only case mentioned by the Fifth Circuit panel in the body of its opinion is *Daniel R. R. . . .*" (Pet. at 8) In fact, the Court of Appeals properly distinguished *Daniel R. R.*, and properly relied on statutes, regulations, and relevant case law. The references in the Court's 29 footnotes (except for notes 11, 26, and 27) all refer to legal authorities. (See App. to Pet. at 2a - 15a and also see footnote 4 to this brief regarding

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[13] The Fifth Circuit declined to follow the Sixth Circuit's analysis regarding mainstreaming questions, and decided that the test in *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), cert. denied, 464 U.S. 864, 104 S.Ct. 196, 78 L. Ed.2d 171 (1983), "necessitates too intrusive an inquiry into the educational policy choices that Congress deliberately left to state and local school officials." *Daniel R. R.*, 874 F.2d at 1046. Petitioner's argument that the failure of the Fifth Circuit to take action en banc when the panel declined to follow the *Roncker* test somehow establishes that the Fifth Circuit "does not consider the IDEA of much importance" (see Pet. at p. 9) is illogical, improper, and inexplicable.

the misnumbering of these footnotes in the Appendix to the Petition.)

Petitioner asserts the Court of Appeals "erred in not finding that Respondent failed to consider that Katie could benefit from a placement at her neighborhood school with the use of supplementary aids and services." (Pet. at i, ¶ 3) This assertion appears in the Question Presented, but it is not argued. Placement issues in connection with provision of supplemental aids and services are based on 20 U.S.C.A. § 1412(5)(B). Analyzing whether a student can benefit from placement in a regular classroom with supplemental aids and services is a mainstreaming issue. See *Daniel R. R. v. State Bd. Of Educ.*, 874 F.2d 1036 (5th Cir. 1989). There is no mainstreaming issue in this case.

Furthermore, in a context as here, where the issue is placement at a school other than the student's home school in order to access quality services, the question is not whether the school district could duplicate on its campus sufficient services for the student to receive educational benefit. The issue is the discretion of the school district to choose to serve the student's educational needs on a campus where quality services already exist. The lack of merit to Petitioner's assertion is demonstrated by the Tenth Circuit:

> "[T]he LRE mandate does not include a presumption of neighborhood schooling, and a school district is not obligated to fully explore supplementary aids and services before removing a child from a neighborhood school. It is only so obligated before removing a child from a regular classroom with nondisabled children."

Murray v. Montrose County School Dist., 51 F.3d 921, 929, 930 (10th Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 278 (1995).

The Court of Appeals properly analyzed and construed the IDEA in the context of the placement decision to educate Katie in a school other than her home school. The Court's exhaustive analysis of the statutory and regulatory scheme for placement decisions explains that the educational planning team first incorporates into the student's individual education plan a description of the types of services needed to address the student's specific educational needs, and then a separate decision is made about placement in the least restrictive appropriate environment for delivery of the services. (App. to Pet. at 9a-10a) The Court of Appeals also properly delineated the scope of judicial authority with respect to intruding on school authorities' educational policy choices and methods. (App. to Pet. at 8a) See also *Board of Educ., Etc. v. Rowley*, 458 U.S. 176, 207-208, 102 S.Ct.3034, 3051-52) (issues of educational policy and methodology are left for the states).

Petitioner's reliance on *Rowley, supra*, on *Burlington School Committee v. Dept. of Educ.*, 471 U.S. 359, 105 S.Ct. 1996 (1985), and on *W.G. v. Bd. of Trustees of Target Range School D.*, 960 F.2d 1479 (9th Cir. 1992) with respect to the need for a student's IEP to address the student's individual educational needs (Pet. at 8-12) simply reiterates the undisputed principle that the services described in a student's individual education plan are to address the student's individual needs. There is no dispute in this case about whether the services described in Katie's IEP (i.e. services by interpreter, speech-language pathologists, audiologist) are designed to address her specific needs related to her deafness. As correctly explained by the Court of Appeals, the decisions about what services are

required and about the place where the required services are to be delivered are two separate inquiries. (App. to Pet. at 9a)

The Court of Appeals noted that the regulations, not the statute, provide that a child placed outside of her home school should be educated as close to home as possible unless the child's IEP requires some other arrangement and, in selecting the placement, consideration should be given to any potential harmful effect on the child or on the quality of services needed by the child. (App. to Pet. at 4a, quoting 34 C.F.R. § 300.552) The school district has options to provide the services itself or to provide the services by contracting with another service provider (App. to Pet. at 10a and note 22 (misnumbered as note 23 on page 10a), quoting 32 (sic 34) C.F.R. Pt. 300, App. C, Question 46)) The Court of Appeals did not misinterpret or misapply the IDEA.

4. The school district properly placed Katie in a program specifically authorized by 20 U.S.C.A. § 1414(d)(3).

States have the option of providing direct services to "children with disabilities who can best be served by a regional or State center designed to meet the needs of such children." 20 U.S.C.A. § 1414(d)(3). The Court of Appeals correctly determined that the "decision to create the regional day schools is a sound policy decision that was intended to be left to the state," (App. to Pet. at 13a), and "Flour Bluff School District was free to utilize the regional day school for its disabled students." (App. to Pet. at 14a)

Petitioner argues that 20 U.S.C.A. § 1414(d)(3) does not allow placing her in the school in which the Regional Day School Program for the Deaf provides direct services because,

she asserts, the Court of Appeals ignored the provision in the statute which states, "except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter." (Pet. at i, ¶ 1, and at 9-10) The subchapter to which Section 1414(d)(3) refers is Subchapter II of the IDEA, consisting of sections 1411 through 1420. Petitioner's argument is irrelevant and meritless.

There is no issue in this case about whether the State of Texas has complied with the IDEA in a manner to allow it to receive federal grants for its support to local education agencies or for its provision of direct special education services through state or regional programs. Furthermore, Petitioner does not argue that the manner in which the RDSPD service providers performed their services was not designed to meet her individual need for assistance in receiving information in the classroom (interpreter), or her individual needs for improving her speaking and language skills (speech-language pathologist) or her individual needs for audiological assessment and equipment maintenance (audiologist).

In connection with her argument about Section 1414(d)(3), Petitioner reargues her insupportable claim that general administrative convenience was given priority over her needs, and "that she does not need these specialized instructional services." (Pet. at 10, emphasis added) The "instructional services" which Petitioner says she does not need apparently means the service by a teacher of the deaf, and does not refer to the related services she received. This is so because Petitioner bases this statement on assessment data[14] and the

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[14] The most recent assessment data available after the administrative hearing but before the time of trial (May 1995 data available at the July 1995 trial) shows that Katie has significant language deficits and there is a continued

opinion of her regular classroom teacher in whose class she was fully mainstreamed. (Pet. at 10) The statement that Katie "does not need these specialized instructional services" clearly does not apply to the related services because she agrees that she "needs an interpreter, an (sic) speech therapist, and occasional access to an audiologist. Tr. Vol. III, p. 60, 1, 3-4)." (Katie's Brief in Court of Appeals at 4, citing testimony of Katie's expert)

5. The Fifth Circuit properly construed the law regarding placement outside a student's home school. It is not in conflict with other circuits which have ruled on this issue.

In arguing that the Court's opinion is in conflict with *Rowley*, 458 U.S. 176, 102 S.C. 3034 (1982), and with *W.G. v. Bd. of Trustees of Target Range School D.*, 960 F.2d 1479 (9th Cir. 1992), Petitioner is not only incorrect about the existence of a conflict, she also omitted any reference to directly relevant case law. Several Circuits have interpreted the statutory and regulatory scheme in the context of placing a child outside his home school in order to provide the student with services available on a different campus.

An especially analogous case addressing the discretion of a school district to utilize centralized services at a school other than a student's home school is *Barnett v. Fairfax County School Bd.*, 927 F.2d 146 (4th Cir.), cert. denied 502 U.S. 859, 112 S.Ct. 175 (1991). In *Barnett*, a high achieving deaf student was mainstreamed in a regular public school with centralized services for deaf students located five miles farther from home

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need for expert assistance for Katie to improve her language skills. (R. Ex. 1-7)

than his base school. In this fact setting nearly identical to Katie's placement at Calk Elementary School, the court stated:

> We also reject plaintiffs' suggestion that the [IDEA] requires the Board to duplicate at Michael's base school a highly specialized education program because Michael's base school is a few miles closer to his home. Adopting plaintiffs' position would require us to intrude upon the educational policy choices that Congress deliberately left to state and local school officials. Whether a particular service or method can feasibly be provided in a specific special education setting is an administrative determination that state and local school officials are far better qualified and situated than are we to make.

Id. at 152.

The Tenth Circuit considered whether a school district properly placed a student at a school ten miles from his home school in order to access a program at the more distant school, and whether 20 U.S.C.A. § 1412(5)(B) includes a presumption that the least restrictive environment is in the neighborhood school with supplementary aids and services. The Court held the least restrictive environment provision includes a preference, but not a presumption, for neighborhood schooling; i.e., a child should be educated in his neighborhood school unless his IEP requires placement elsewhere, in which case the geographically closest appropriate facility should be selected. *Murray v. Montrose County School Dist.*, 51 F.3d 921, 929, 930 (10th

Cir.), cert. denied, ___ U.S. ___, 116 S.Ct. 278 (1995).[15] The Court of Appeals agreed with the Tenth Circuit and "emphasized that the proximity preference or factor is not a presumption that a disabled student attend his or her neighborhood school." (App. to Pet. at 11a)

Recently, the Tenth Circuit decided *Urban v. Jefferson County School Dist. R-1*, 89 F.3d 720 (10th Cir. 1996), a case in which a disabled child argued, among other issues, that he should be placed in his home school rather than a different school where programs specific to his needs were in existence. The Court stated:

> Gregory . . . bases his appeal solely on the ground that he was denied transition services in a specific location--his neighborhood school in Evergreen. As we held in *Murray*, the IDEA does not give him a right to a placement at a neighborhood school . . . The IDEA only entitles Gregory to an appropriate education, and the state "satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203, 102 S.Ct. at 3049. Gregory received and benefitted from such personalized

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[15] To the extent the Third Circuit considers the IDEA to encompass a presumption, rather than a preference, for neighborhood schooling, the Tenth Circuit disagrees. See *Murray*, 51 F. 3d at 929 referring to *Oberti v. Board of Educ.*, 995 F. 2d 1204 (3rd Cir. 1993). The Court in *Murray* noted that the *Oberti* court appeared to qualify the presumption and, in any event, *Oberti* was an inclusion case where removal from a neighborhood school as part of removal from a mainstream classroom was a secondary issue. 51 F.3d at 929, n. 13.

> instruction. The IDEA does not entitle him to more.

Id. at 727. See also *Poolaw v. Bishop*, 67 F.3d 830 (9th Cir. 1995) (placement of deaf student in a residential school 280 miles from home complied with IDEA); *Wilson v. Marana Unified Sch. Dist. Of Pima County*, 735 F.2d 1178 (9th Cir. 1984)(placement of physically handicapped child at school in a nearby district to obtain better services was proper, even though the parents preferred the neighborhood school with lesser services); *Schuldt v. Mankato Sch. Dist.*, 937 F.2d 1357 (8th Cir. 1991), cert denied 502 U.S. 1059, 112 S.Ct. 937 (1992) (placement of physically handicapped child in a fully accessible school four miles farther from neighborhood school was proper); *Lachman v. Illinois St. Bd. of Educ.*, 852 F.2d 290 (7th Cir.), cert. denied, 488 U.S. 925, 109 S.Ct. 308 (1988) (placement of deaf student in a regional program integrated into a regular school was proper).

Petitioner cannot argue genuinely that a conflict exists. The Fifth Circuit's joining the Fourth, Seventh, Eighth, Ninth, and Tenth Circuits in construing the discretion of educators to provide for delivery of appropriate services to a disabled student at a school other than the student's home school conforms with the body of established law.

6. The Court of Appeals did not err in its standard of review.

Petitioner asserts the Court of Appeals failed to give due weight to the decision of the state special education hearing officer, and therefore substituted its own notions of sound educational policy for those of the school authorities being reviewed. (Pet. at 13)

With respect to the references to sound educational policy, it was the hearing officer and district court, not the Court of Appeals, who substituted their own notions for that of school authorities and misinterpreted the law as well as their roles in doing so. Furthermore, Petitioner incorrectly refers to the hearing officer as a "school authority." (Pet. at 14) In Texas, special education hearing officers are private attorneys who contract with the state to conduct the administrative due process proceedings. (R. Ex. 9) They are not employed as educators by the state or by local school districts. The only decisions by school authorities in this case are the decisions made by the state education agency in administering the Regional Day School Program for the Deaf, and by the local school district in creating Katie's IEP and deciding where the IEP should be implemented.

In *Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F. 2d 1285, 1289 (5th Cir. 1991), the Fifth Circuit joined the Sixth, Seventh, and Ninth Circuits in deciding that the decision whether the IEP fulfills the IDEA is a mixed question of fact and law subject to *de novo* review. It is obvious the Court of Appeals applied a proper standard of review and corrected the district court's errors of law.

CONCLUSION

In reversing the district court judgment, the Court of Appeals correctly determined that the district court erred in relying on the hearing officer's conclusion about statutory interpretation, erred in presuming Katie's proper placement was her neighborhood school even though Katie required arrangements not in existence at Flour Bluff, erred in giving no weight to testimony about scarcity of educational resources, and erred in failing to consider the school district's policy consideration in sending Katie to the school with the regional

day school program. (App. to Pet. at 14a-15a)

The Court of Appeals' opinion is well-reasoned, based on established law, and clearly correct. The writ should be denied.

Respectfully submitted,

SHIRLEY A. SELZ
Counsel of Record
GARY, THOMASSON, HALL
& MARKS
Professional Corporation
Attorneys for Respondent
P.O. Box 2888
Corpus Christi, Texas 78403
(512) 884-1961

APPENDIX

20 U.S.C. Chapter 33

20 U.S.C.A. § 1401 Definitions

(a) As used in this chapter--

(1)(A) The term "children with disabilities" means children--

(i) with mental retardation, hearing impairments including deafness, speech or language impairments, visual impairments including blindness, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities;

(16) The term "special education" means specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability, including--

(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and

(B) instruction in physical education.

(17) The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

(18) The term "free appropriate public education" means special education and related services that--

(A) have been provided at public expense, under public supervision and direction, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under Sec. 1414(a)(5) of this title.

20 U.S.C.A. § 1414 Application

(d) Special education and related services provided directly by State educational agencies; regional or State centers

Whenever a State educational agency determines that a local educational agency--

(1) is unable or unwilling to establish and maintain programs of free appropriate public education which meet the requirements established in subsection (a) of this section;

(2) is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain such programs; or

(3) has one or more children with disabilities who can best be served by a regional or State center designed to meet the needs of such children; the State educational agency shall use the payments which would have been available to such local educational agency to provide special education and related services directly to children with disabilities residing in the area served by such local educational agency. The State educational agency may provide such education and services in such manner, and at such locations (including regional or State centers), as it considers appropriate, except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter.

TEXAS EDUCATION CODE

SUBCHAPTER I. PROGRAMS FOR STUDENTS WHO ARE DEAF OR HARD OF HEARING

Tex. Educ. Code § 29.301. Definitions

In this subchapter:

(1) "Admission, review, and dismissal committee" means the committee required by State Board of Education rules to develop the individualized education program required by the Individuals with Disabilities Education Act (20 U.S.C. Section 1400 et seq.) for any student needing special education.

Tex. Educ. Code § 30.081. Legislative Intent Concerning Regional Day Schools for the Deaf

The legislature, by this subchapter, intends to continue a process of providing on a statewide basis a suitable education to deaf or hard of hearing students who are under 21 years of age and assuring that those students have the opportunity to become independent citizens.

TEXAS ADMINISTRATIVE CODE

Tex. Admin. Code Chapter 89. Adaptations for Special Populations

§89.1050. The Admission, Review, and Dismissal (ARD) Committee.

(b) Each school district shall establish at least one ARD committee that shall make decisions concerning eligibility determinations, development of the IEP, consideration of assistive technology, development of the behavior management plans, and placement of a student referred for consideration for special education services in accordance with 34 Code of Federal Regulations (CFR), §§300.308. 300.342-300.349, 300.533 and 300.550-300.554, and Part 300, Appendix C; state statute; State Board of Education (SBOE) rules; and this subchapter.

Source: The provision of this §89.1050 adopted to be effective September 1, 1996, 21 TexReg 7236.

LIST OF MISSTATEMENTS OF FACT AND LAW IN THE PETITION

1. Assertion: "Katie wanted to transfer to Flour Bluff Elementary since she is capable of functioning in a world that does not make accommodations for her disability (App. 22a, 27a), and she could attend school with her neighborhood friends." (Pet. at 5)

Correction: There is no evidence that Katie's desire to transfer is based upon her assessment or belief she can function in a world that does not make accommodations for disability. Furthermore, whatever school she attends is required by IDEA to make accommodations for her disability by providing appropriate services. There is no evidence that Katie wished to discontinue the services of an interpreter, speech therapist, or audiologist, and no evidence that, if she held such a desire, the services should be discontinued. The last phrase in the above-quoted assertion is correct; i.e., Katie testified in the administrative hearing that she wishes to attend school with her neighborhood friends. The evidence also shows that, of the approximately 400 students in Katie's grade level Flour Bluff Elementary School, 31 lived on the same island as Katie and three resided near her home. (R. Ex. 11, p. 134 (p. 317-318))

2. Assertions: "The best way for Katie to function in that world [that does not make accommodations for her disability] would be to attend the school she would attend were she not disabled." (Pet. at 5-6)

"The District Court was correct in finding that Placement of Katie in her neighborhood school would most closely approximate the world Katie will encounter as an adult (App. 27a)." (Pet. at 13)

Correction: The best way for a deaf child to

function in the adult world is surely correlated with the quality of the child's language and communication skills, but there is no evidence that the skills are developed to a higher degree by the child's attendance at her home school with inferior services compared to a nearby school with superior services.

Furthermore, Respondent disagrees (as did all expert witnesses with experience teaching deaf children) that during Katie's educational program she should be placed in an environment that most closely approximates the adult world; a world in which there will be no IEP or entitlement to the range of services to which Katie is entitled while she is eligible for IDEA services. However, as a legal matter, the provision of services appropriate to Katie's need for assistance in receiving information (interpreter) and need for development of speech and language skills (speech-language pathologist), and need for audiological assessment and equipment management (audiologist) must be geared to her needs in the educational setting as those needs now exist in her formative years and as they may change throughout the course of her education until she enters the adult world.

3. Assertion: "Because of Katie's exceptional skills, this [home school] placement would be appropriate for her." (Pet. at 6)

Correction: Exceptional skill relates to the type and degree of services needed, but does not relate to the school district's discretion in determining the method to deliver the needed services.

4. Assertions: "The ARD Committee did not consider Katie's individual needs when they denied her transfer to her neighborhood school. (App. 26a, 27a). The Respondent's only consideration, in denying Katie's request, was that Katie was a deaf student, and Flour Bluff ISD sends its deaf

students to the regional day school program. (App. 26a)." (Pet. at 6)

Correction: Page 26a of the Appendix includes the district court's recitation of statements that several ARD committee members based their decision not on Katie's abilities, but on the Regional Day School's services [identified on App. page 27a as an interpreter, speech therapist, and audiologist], and a list of six enumerated reasons expressed by ARD Committee members. These reasons are not simply "Katie is deaf."

5. Assertions: "The opinion illustrates the lack of interpretive standards in the Fifth Circuit concerning the rights of disabled students . . ." (Pet. at 7)

"However, the progress made by this Court should not be limited by opinions such as the one at issue when it is obvious that the purposes of the Act are misunderstood." (Pet. at 8)

"*Daniel R.R.* illustrates the statements in the Fifth Circuit's reasoning wherein Justice Gee, joined by Justices Thornberry and Politz, in reference to their inability to grasp the importance of the clear purpose of the Act, and this Court's elucidation of same in *Rowley*, . . ." (Pet. at 8)

"It is submitted that the Fifth Circuit, unlike this Court and Congress, does not consider the IDEA of much importance." (Pet. at 9)

Correction: These statements on pages 7-9 of the Petition are outrageous accusations without any factual foundation and are misinterpretations of Fifth Circuit opinions in the case before the Court and in *Daniel R.R. v. State Bd. of Educ*, 874 F.2d 1036 (5th Cir. 1989). Arguments in response

to Petitioner's assertions are contained within Respondent's Brief.

6. Assertion: "The opinion in the Court below criticizes the District Court for focusing upon the costs of the individual program Katie desired at her neighborhood school in the Flour Bluff ISD. (App. 11a)." (Pet. at 9)

Correction: The Court of Appeals did not criticize the District Court for focusing on financial program costs, but held that the District Court failed to consider, in addition, the educational resource costs of duplicating the programs. (App. to Pet. at 14a-15a) Furthermore, to the extent the phrase "individual program Katie desired at her neighborhood school" conveys the implication that a program different from the program set out in Katie's IEP is at issue, the implication is incorrect. The contents of Katie's IEP (mainstreaming with an interpreter; related services by speech-language pathologists and audiologists) are not at issue; the only issue is the location where the services are to be delivered.

7. Assertions: "The basis of the Court's statement that Katie's individualized, unique needs were of secondary importance . . ." (Pet. at 9)

"Are general convenience considerations of administrators to be given priority over the disabled child with his/her unique, individualized needs?" (Pet. at 10)

"As Petitioner has stated, the opinion below states a preference for administrative convenience over the unique needs of the student." (Pet. at 12)

Correction: The Court of Appeals did not make a statement that Katie's individualized, unique needs were of secondary importance, did not subordinate her needs, and did

not base its decision on administrative convenience. Arguments responding to these erroneous assertions are included in Respondent's brief.

8. Assertion: The Court below must not have considered the proviso in this section [20 U.S.C.A. § 1414(d)] . . . (Pet. at 9) "This proviso was certainly ignored by the Court below." (Pet. at 10)

Correction: The "proviso" in § 1414(d)(3) specifies that states may utilize federal funds to provide direct services through regional and state centers "except that the manner in which such education and services are provided shall be consistent with the requirements of this subchapter." Because the manner in which direct services were provided (i.e., state-supported interpreter, speech-language pathologist, audiologist) was not at issue, there is no basis to imply significance to the "proviso" or assume the Court of Appeals ignored it. Argument regarding the "ignoring the proviso" theory is included in Respondent's brief.

9. Assertions: "Petitioner merely claims (and is supported by assessment data, and also, her teacher) that she does not need these specialized instructional services." (Pet. at 10)

"Katie simply asks to function in a world without accommodations for her disability (those found in the regional day school program), when she doesn't need them. Katie's regular education teacher testified that Katie could be successful in any classroom if she were given an interpreter, preferential seating and a copy of class notes." (Pet. at 13)

Correction: To the extent Petitioner's statement implies she does not need the specialized related services which Regional Day School Program for the Deaf specialists provided

[i.e., interpreter, speech-language pathologist, audiologist], this implication is contrary to undisputed testimony. To the extent Petitioner intended to limit her assertion to a lack of need for instructional services by the RDSPD teacher of the deaf, it is correct that she was fully mainstreamed at Calk Elementary School after an ARD Committee meeting in October 1994. To the extent Petitioner implies that her teacher expressed an opinion about lack of need for related services, this is incorrect. Her teacher acknowledged Katie needed an interpreter, and expressed no opinion at all about Katie's need for speech therapy or audiology services. To the extent Petitioner implies that assessment data shows she needs no services, this is incorrect.

10. Assertions: "It is obvious that the reasoning of the Fifth Circuit cannot be reconciled with this Court's holding in *Rowley*." (Pet. at 10)

"In spite of clear pronouncements by this Court of the construction to be given to the Act, the opinion below strongly illustrates the Fifth Circuit Court's improper interpretation of the Act. This results in many children, like Petitioner, not having their individual needs met in accordance with Congress' mandate." (Pet. at 11)

Correction: These statements are outrageous misstatements without any factual foundation and are misrepresentations of the Fifth Circuit Court's opinion. Further arguments in the response to Petitioner's criticisms of the Court of Appeals are contained within Respondent's brief.

Moreover, this case is not about denial of services or about failure to provide services prescribed in Petitioner's IEP or otherwise about unmet educational needs. Katie's social desire to attend school with friends and the district court's opinion that Katie would benefit by an environment with fewer services (and, necessarily, lower quality services) cannot

constitute an unmet educational need in a practical sense and certainly cannot constitute a unmet educational need in a legal sense as contemplated by the IDEA. The accusation that the Court of Appeals' opinion (which properly confirms the discretion of the school district to choose to provide services to Katie on a nearby campus instead of her home campus) results in "many children . . . not having their individual needs met" is preposterous.

11. "The quality of the education of disabled children is certainly of greater national importance than the validity of rate schedules issued by the Federal Power Commission or the effect of a strike upon national labor policy," citing *United Gas Pipe Line v. Memphis L. G. & W. Div.*, 358 U.S. 152, 79 S.Ct. 184 (1959) and *United Steelworkers of America v. N.L.R.B.*, 376 U.W. 492, 84 S.Ct. 899 (1964). (Pet. at 11-12)

Correction: While it is obvious that the quality of education of disabled children is very important, the quality of education is not at issue in Petitioner's claims. Her claim concerns placement only. The assertion is misleading, however, because it is implies the school district has compromised quality. In fact, it is the school district which has consistently sought to place Katie at a school with RDSPD specialists on staff where Katie's IEP-required services can be delivered to her by higher quality service providers than the school district can provide on its own campus. It is Katie who desires to be placed on a campus where RDSPD interpreters and speech-language pathologists are not available.

Furthermore, the recitations in the *United Gas Pipe Line* and *United Steelworkers* cases about reasons to grant writs merely illustrate the practical application of Supreme Court Rule 10. Where, as in this case, there is no conflict among appellate decisions regarding the general scope of a

school district's discretion in selecting an appropriate location for implementing a child's IEP, the requirements of Rule 10 clearly have not been met, and there is no national importance such that this Court should write on an issue about which the Circuits do not disagree.

12. Assertion: "As a further basis for granting of this petition, Petitioner shows that the opinion below demonstrates a clear conflict between the Fifth Circuit and the Ninth Circuit concerning the emphasis placed by the respective courts of the individualized needs of the disabled student," citing *W.G. v. Bd. of Trustees of Target Range School D.*, 960 F.2d 1479 (9th Cir. 1992) for the proposition that "Central among the safeguards is the process of developing an individualized education program ("IEP") for each child." (Pet. at 12)

Correction: There is no conflict between the Fifth and Ninth Circuits with respect to the emphasis placed on the individualized needs of the disabled student. There is no issue in this case about the process of developing Katie's IEP or whether the services prescribed therein addressed her individual educational needs. There is no conflict between the Fifth Circuit or other circuits regarding the issue on which the Court of Appeals rendered its decision.

13. Assertion: "Thus, the opinion of the Court below has, contrary to this Court's statement in *Rowley* 'substituted their own notions of sound educational policy for those of the school authorities which they review.' *Rowley* at p. 3051 of 102 S.Ct. 3034. The opinion at issue failed to give any weight to the decision of the school authority, the Special Education Hearing Officer of the State of Texas." (Pet. at 13-14)

Correction: The issue of the proper standard and scope of review is addressed in Respondent's brief. The

assertion that the Court of Appeals substituted its notion of sound educational policy for that of school authorities is opposite to the circumstances in this case. This issue is also addressed in Respondent's brief.

14. Assertion: "In summary, because of its lack of rationale, and legal basis, the opinion below cries out for review by this Court. Indeed, the Fifth Circuit, by stating in *Daniel R.R.* that this Court has rendered an 'imprecise ... directive' concerning a pivotal section in this case, 20 U.S.C. Sec. 1401(20), upon which the opinion at issue relies, it should be concluded that the Fifth Circuit petitions this Court for review of this case. It is clear that further guidance is needed from this Court because of the incorrect interpretation of the Act by the Court below. A correct construction of the Act is required by this Court so that the intent of Congress' mandate can be fulfilled. This is a matter of national importance affecting the educational rights of millions of disabled students." (Pet. at 14)

Correction: These statements critical of the Court of Appeals are outrageous misrepresentations. Arguments about such criticisms are included in Respondent's brief. The assertion that the decision of the Court of Appeals creates a matter of national importance affecting the educational rights of other (although probably not millions) of disabled students is true not because the Court erred, but because the Court was correct in joining other circuits is interpreting the law to permit school districts to implement students' individual education plans on campuses with higher quantity and quality of specialists than the school districts can provide on their home campuses. Indeed, students, including Katie, should reap substantial benefits from the Court of Appeals' opinion.